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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RALPH L. READ, M.D.,

Petitioner,

v.

MEDICAL X-RAY CENTER, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD R. WINTER
(Counsel of Record)
HENRY S. ALLEN, JR.
GEORGE M. SANDERS
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, IL 60661
(312) 715-5700

STEVEN W. SANFORD
CADWELL SANFORD
DEIBERT & GARRY, LLP
120 North Phillips Avenue
Sioux Falls, SD 57102
(605) 336-0828
Counsel for Petitioner

Of Counsel:
STEPHEN F. ROSS
University of Illinois
College of Law
Champaign, IL 61821
(217) 333-2502

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

A jury found that a dominant health care practice willfully maintained its monopoly by a number of exclusionary practices at five different market entry points. The court of appeals' reversal of that verdict focused on the monopolist's conduct at the only point of market entry which was not subject to an exclusive dealing arrangement, thereby raising the following questions:

Whether a monopolist, as a matter of law, may charge a rival a fee for not discriminating against the rival's customers on the grounds that the rival is "free riding" on the larger capacity of the monopolist.

Is a monopolist's conduct—which forecloses rivals—excused from condemnation as unlawful monopolization because the challenged conduct is a "customary practice" in the monopolized market?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Ralph L. Read, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 110 F.3d 543. The opinion of the district court (App., *infra*, 11a-30a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 2, 1997 (App., *infra*, 1a). A timely filed petition for rehearing was denied on May 9, 1997 (App., *infra*, 10a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act (15 U.S.C. Sec. 2) provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act (15 U.S.C. Sec. 15) provides, in pertinent part, that:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

Introduction

While the factual summary which follows provides additional details, the jury, the district court and the Eighth Circuit all agreed as to these basic facts:

- Respondent Medical X-Ray Center ("MXC") has monopoly power in the market for radiology services in and about Sioux Falls, South Dakota (App., *infra,* 15a);
- in response to Petitioner Dr. Read's entry into the market as a rival radiologist, MXC obtained exclusive deals to provide radiology services at all but one hospital in the market (App., *infra,* 7, 15, 18, 28a);
- at the one hospital not completely foreclosed by an exclusive deal, consumers (in the form of referring physicians and the Medical Staff Executive Committee) requested the ability to designate, in advance, Dr. Read as their first choice and MXC as their second choice of radiologist (Exh. 142);

- MXC declined to accept unconditionally referrals from Dr. Read's customers. MXC was willing to accept referrals from Dr. Read's customers only "*if* Dr. Read signed a 'coverage contract' . . ." (App., *infra*, 4a). The proposed contract required that Dr. Read pay MXC an unspecified sum as a condition to MXC accepting referrals from Dr. Read's customers. (App., *infra*, 4a); and
- Dr. Read refused to pay MXC the demanded payment (App., *infra*, 6a).

The jury found MXC's conduct was anticompetitive, and the district court affirmed. The court of appeals' reversal of the jury's verdict effectively permits a monopolist to charge a rival a fee as a condition for not discriminating against the rival's customers, under the pretense that the rival is "free riding" on the capacity of the monopolist.

The Market

There are five hospitals within a twenty-five mile radius of Sioux Falls, South Dakota. McKennan Hospital ("McKennan") and Sioux Valley Hospital ("SVH") are 400-plus bed tertiary care centers; there are no comparable hospitals within 80 miles of Sioux Falls. Tr. 683; 694. Sioux Falls also has a sizable Veteran's Administration ("VA") hospital. Tr. 517. Two small hospitals lie 20 miles outside the Sioux Falls city limit: Canton-Inwood Hospital and Dell Rapids Community Hospital.

MXC's Monopoly Power

For at least 25 years, Respondent MXC has been the exclusive provider of radiology services in this market. It

employs all 24 radiologists privileged at the five hospitals referred to above. Tr. 120; 131-132. MXC's expert economist testified that with the exception of when Dr. Read was practicing independently, none of the three traditional forms of competition in radiology services—competition for exclusive contracts, competition for employment by hospitals or case-by-case competition for referrals in an open staff—was present in the market. Tr. 2912-13.

Within the relevant geographic market, MXC had an undisputed 90% share of inpatient radiology services. Tr. 420; 922; 931.[1] MXC's prices, on average, were 20% higher than those charged on average in South Dakota and 15% higher than prices in competitive markets in the seven-state region surrounding South Dakota. Tr. 542-44.

The rulings of both the district court and the court of appeals left intact the jury's finding that MXC had monopoly power.

The Restrictive Covenants

Since 1987, each MXC physician has been contractually restricted from practicing within 25 miles of the Sioux Falls city limits for a period of 2 years after leaving MXC. Tr. 140; 2378; 2299; Exh. 210. MXC also resorted to a market division scheme to foreclose entry by potential competitors. Exh. 64. Each of these activities inhibited the formation of a rival for MXC and curtailed the supply of other potential associates/employees for Dr. Read.

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[1] The other 10% of radiology services was performed by orthopedic surgeons, cardiologists and OB/GYNs performing a limited range of diagnostic procedures on their own patients. Tr. 293, 422, 436, 1189.

Dr. Read

Dr. Read joined MXC in 1975. Tr. 1319. By 1987, Dr. Read sought to create a different practice style, one that emphasized quality of care rather than high incomes. Tr. 1450. Every other radiologist who had left MXC simply left town. But Dr. Read decided to resign from MXC, ride out his restrictive covenant and then compete with MXC. To avoid forced idleness during the restrictive covenant period, Dr. Read contracted with MXC to be an independent contractor. Tr. 1462; 1550. Between mid-1988 and mid-1990, he worked days and nights at all Sioux Falls hospitals under this arrangement. Tr. 1399; 1468.

The Exclusive Dealing Arrangements

In March 1990, Dr. Read announced his intent to compete with MXC once his restrictive covenant expired, and to undercut MXC's prices. In response to Dr. Read's decision, MXC shored up its defenses to entry. In a deal with the Central Plains Clinic ("CPC"), MXC agreed to increase CPC's share of revenue generated from outpatient radiology work performed by MXC at the clinic in return for CPC's promise that its physicians would refer to MXC all the inpatient radiology work required by their patients at area hospitals. Exh. 112, 136, 138, 166; Tr. 825, 829-31. This arrangement was enjoined by the district court. MXC also obtained exclusive dealing arrangements at the VA Hospital and McKennan and enforced an exclusive contract at Canton-Inwood. Exh. 36, Exh. 79; Tr. 313, 322, 328, 392, 1111, and 1413-14.

Collectively, these exclusive arrangements foreclosed 70% of the market to MXC's competitors, leaving one viable practice option for Dr. Read—the case-by-case competition for referrals in SVH's open staff.

Sioux Valley Hospital ("SVH")

SVH had an open staff in radiology, meaning that any privileged radiologist could compete for referrals from SVH's Medical Staff. MXC did not have any contractual arrangement with SVH; and Dr. Read held privileges there equal to those held by MXC's radiologists. Tr. 1206, 1405.

After his restrictive covenant expired, Dr. Read sought to exercise his privileges at SVH. Tr. 1541, 1560. SVH's medical staff decided that referring physicians not bound to MXC by the CPC/MXC contract should be permitted to select either MXC or Dr. Read on "choice cards". Dr. Read sought to give individual referring physicians the option to designate Dr. Read as their first choice and MXC as a second choice, when Dr. Read was not available. Tr. 1209-10; Tr. 1568-69; Exh. 108. MXC would be able to bill the patient for this referral work at its own prices. Tr. 1601. MXC vetoed Dr. Read's suggestion. Tr. 1329. The SVH Medical Staff Executive Committee—a group comprised of physician department heads—endorsed Dr. Read's suggestion. Tr. 1212; Exh. 142. MXC again vetoed it. Tr. 1315, 1330.[2]

MXC's unwillingness to service Dr. Read's customers had the desired effect. One of Dr. Read's customers, Dr. Friess, testified that because he feared MXC would not accept his referrals when Dr. Read was not available, he was forced to discontinue using Dr. Read. Friess Tr., p. 10.

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[2] Dr. Read also repeatedly stated that he was willing to take his proportional share of SVH-mandated night and weekend call. Exh. 122. Dr. Read also was willing to accept cases from MXC's customers when MXC was not available. Tr. 1766.

MXC's Demand for "Monopoly Rent"

After rejecting the wishes of the SVH Medical Staff, MXC offered Dr. Read a take-it-or-leave-it "coverage contract." The contract required Dr. Read to pay MXC an *unspecified* sum of money, in return for MXC's agreement to accept referrals from Dr. Read's customers. Exh. 944. Dr. Read rejected this demand.

The Jury Verdict

After a three week trial, the jury deliberated for two days before finding that MXC had violated Sections 1 and 2 of the Sherman Act. Dr. Read was awarded $608,000 (before trebling).

The District Court's Opinion

The district court denied MXC's motion for judgment as a matter of law as to the jury's Section 2 verdict, but granted the motion with respect to the Section 1 verdict. Regarding the Section 2 claim, the district court deferred to the jury's finding that MXC's conduct was anticompetitive and caused Dr. Read injury. It concluded that MXC's market division scheme was "the most explicit evidence of defendant trying to keep others out of their business." App., 15a. The district court also entered an injunction prohibiting the enforcement of MXC's restrictive covenants and its exclusive referral deal for hospitalized patients with the CPC, conditioned upon Dr. Read returning to Sioux Falls to practice. App., 28a.

With respect to the Section 1 claim, the court found: 1) that area hospitals had not conspired with MXC; and

2) that exclusive contracts are not "necessarily violative of Section 1." App., 18a.

The Eighth Circuit's Opinion

The Eighth Circuit's opinion focused on MXC's conduct at SVH. The court held that, "Dr. Read's lack of coverage cost him business" but that MXC "proposed a reasonable written contract that would have solved Dr. Read's coverage problem . . ." App., 6a. It also found that "Dr. Read's injury was caused by legitimate competition" because "Dr. Read wanted to 'free ride' . . . by forcing MXC to provide [24 hour coverage] to him for free." *Id.* The court concluded that, "MXC's insistence on a coverage contract from a price-chopping competitor was not unreasonable or anticompetitive." App., 8a.

The court also found that MXC's restrictive covenants, which precluded other MXC physicians from associating with Dr. Read, did not cause Dr. Read's injury because, it said, "Dr. Read presented no evidence that any individual MXC doctor wanted to cover Dr. Read but could not but for MXC's restrictive covenants." App., 6a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's opinion ignores this Court's precedents and eschews the analytical framework applied by other Circuits by concluding that a monopolist may charge a rival a fee as a condition for not discriminating against the rival's customers. The result demonstrates the need for further guidance from this Court with respect to the proper framework in which to differentiate unlawful anticompetitive behavior from justifiable efforts to prevent "free riding."

A monopolists' discrimination against its rivals' customers was unanimously condemned by this Court in *Lorain Journal v. United States*, 342 U.S. 143, 72 S. Ct. 181 (1951) and again in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847 (1984). In *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 97 S. Ct. 2549 (1977), the Court held that vertical restraints designed to prevent a "free ride" on unrecoverable capital investment could be justified as procompetitive and lawful. But the Court has never had the opportunity, on a fully developed record, to address the extent to which the "free rider" rationale may be employed to justify otherwise anti-competitive conduct, particularly where those violations involve horizontal restraints imposed by a monopolist. Although many courts of appeals (other than the Eighth Circuit) have properly required examination of the actual purpose and impact of restraints directed to alleged free riders, the court of appeals' opinion in this case accepts the free rider justification *as a matter of law*, without inquiring into the restraint's impact on consumers or its justification. Unreviewed, the decision invites monopolists to misuse the insights recognized by *Sylvania* in order to lessen competition and harm consumers, without reference to whether there are normal pro-competitive benefits arising from the restraint.

This case also has significant implications for the antitrust doctrine of foreclosure through exclusive dealing, a practice which recurs in the health care industry. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551 (1984). Although exclusive dealing arrangements between certain medical specialty practice groups and hospitals may generate efficiencies, antitrust doctrine precludes these arrangements where the effect is to foreclose meaningful competition. At SVH, MXC achieved the

same level of exclusion as it would have with an exclusive contract, but without the pro-consumer benefits, by imposing a discriminatory fee on Dr. Read.

I.

THE EIGHTH CIRCUIT'S OPINION IGNORES *LORAIN JOURNAL, ASPEN, SYLVANIA* AND *CONTINENTAL ORE* AND THE ANALYTICAL FRAMEWORK ADOPTED BY OTHER CIRCUITS FOR APPLYING THESE DECISIONS

A. The Outcome Of This Case Turns On Whether MXC's Conduct Was Anticompetitive

Although the Eighth Circuit characterized its opinion as a causation analysis, the opinion rests on the court's view that MXC's demand for a "penalty payment" from Dr. Read was not anticompetitive. The court of appeals acknowledged that Dr. Read's "lack of coverage cost him business at SVH and McKennan." App. 6a. But it found that the "coverage contract"—which, according to the court, would have "solved Dr. Read's coverage problem"—was "not unreasonable or anticompetitive." App. 8a. It concluded that "we believe Dr. Read's injury was caused by legitimate competition rather than anticompetitive conduct." App. 8a. It follows that if MXC's insistence on a payment from Dr. Read *were* anticompetitive, Dr. Read has established causation. *See*, Areeda and Hovenkamp, *Antitrust Law*, Par. 362, n. 1 (1997 Supp.) ("Courts continue to find lack of antitrust injury when what they clearly mean is lack of any recognizable antitrust violation.")

B. The Eighth Circuit's Analysis Would Eviscerate This Court's Holdings In *Lorain Journal* And *Aspen*

Almost 50 years ago, the Court held in *Lorain Journal* that Section 2 prohibits a firm from exercising monopoly

power by refusing to deal with customers solely because of their decision to continue to patronize a rival. In its recent unanimous decision in *Aspen,* the Court frequently cited this principle with approval.[3] The court of appeals failed to even cite these decisions, despite their direct applicability here.

Lorain Journal involved the discrimination by a monopolist newspaper towards advertisers who also advertised with a new rival, a local radio station. Similarly, in this case MXC demanded the payment of a "penalty fee" in return for not discriminating against Dr. Read's customers. The ability to impose a penalty on the radio station's customers occurred in *Lorain Journal* because advertisers who wanted to reach a full audience needed to continue to do some business with the Lorain Journal. Similarly, physicians who preferred Dr. Read's less expensive services still needed to do business with MXC when Dr. Read was unavailable.[4] In neither case, of course, is there a "free rider" problem; advertisers in *Lorain Journal* would have been willing to pay the usual rate for newspaper ads, just as SVH's referring physicians, on behalf of patients, were willing to pay MXC's usual fees. Under the Eighth Circuit's reasoning, however, the Lorain Journal could have lawfully insisted that the rival radio station pay a special fee as a

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[3] Likewise, in *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 483, 112 S. Ct. 2072, 2091, n.32 (1992), this Court observed that a monopolist can refuse to deal with its competitors "only if there are legitimate reasons for the refusal."

[4] The court of appeals' suggestion that "hospitals and primary care doctors desired 24-hour service for their patients," (App., 6a) should not be mistaken for a consumer preference for how the service was to be delivered. Indeed, what consumers preferred here was the ability to choose Dr. Read as their first choice, and MXC as their second.

condition for the Journal's continued acceptance of advertisements from patrons of both outlets.

In *Aspen*, the Court sustained a finding of monopolization where the defendant ceased a profitable joint venture with the plaintiff to provide a product desired by consumers. The defendant there was "willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610-611; 105 S. Ct. at 2861. MXC made the same sacrifice here, foregoing the chance to impress Dr. Read's customers and earn fees for the longer-term benefit (to MXC) of those customers having no choice but to use MXC.

Strikingly, the defendant in *Aspen*, like MXC here, offered to continue the joint venture provided that the *Aspen* plaintiff accept a sharp reduction in its share of the venture's revenue. The Eighth Circuit's reasoning that Dr. Read should have accepted MXC's demand for a payment would suggest that in *Aspen*, the plaintiff's failure to accept the defendant's coercive offer precluded a finding that the misconduct caused antitrust injury. Of course, this is precisely opposite to the holding in *Aspen*.

C. The Eighth Circuit Misconstrued And Misapplied The Free Rider Concept

Because neither Dr. Read nor his customers sought to misappropriate any investment made by MXC, there is no free rider problem in the first instance. But even assuming MXC would incur marginal costs to accept cases from Dr. Read's customers, the Eighth Circuit's declination to analyze whether those costs were in line with the costs sought to be imposed on Dr. Read is at odds with how the free rider issue has been analyzed in the other Circuits. A disciplined analysis is particularly important where, as here,

the challenged restraint was imposed by a monopolist on a horizontal competitor (as opposed to a vertical restraint imposed by a manufacturer on a dealer).[5]

1. There is no free rider problem here

The "free rider problem" was articulated by this Court in *Continental T.V., Inc. v. GTE Sylvania Incorporated*, 433 U.S. 36, 97 S. Ct. 2549 (1977) ("*Sylvania*"). At issue in *Sylvania* was whether a manufacturer's territorial restriction on its distributor should be *per se* illegal or whether it should be subjected to Rule of Reason analysis. In concluding that the Rule of Reason should be applied, the Court observed that "economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers" and that such restraints may be used "in order to induce competent and aggressive capital and labor that is often required in the distribution of products unknown to the consumer." 433 U.S. at 54-55, 97 S. Ct. at 2560.

In this case, the court of appeals did not identify any unrecovered investment MXC made to accept cases from Dr. Read's customers because there was none. Dr. Read did not ask MXC to staff SVH's radiology department at times MXC would not have otherwise provided radiology services. He did not ask MXC to alter whatever patient schedule was in place to accommodate a referral from a physician who otherwise dealt with Dr. Read. Nor did Dr. Read ask MXC

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[5] Indeed, some commentators have questioned whether the "free-riding" concept is even applicable in this context. *See*, Ahern, *Refusals to Deal After Aspen*, Antitrust Law Journal, Fall 1994 ("[T]o sanction a refusal to deal based on this type of "free-rider" argument would eviscerate liability in refusal to deal cases—and essential facilities cases as well.")

to provide such patients any services over and above the services MXC normally provided. To say that MXC was accommodating Dr. Read is to say that Home Depot accommodates a neighborhood hardware store by being open on Sunday.

All Dr. Read asked of MXC was that asked by WEOL of the Lorain Journal—that when a referring physician came knocking on MXC's door, that MXC either accept or reject the case using their usual economic criteria, and not the criteria of whether the referring physician had selected Dr. Read as their first choice of radiologist.[6]

2. The Eighth Circuit's application of a *per se* rule of *non*-liability conflicts with the analysis of several Circuits

Once the court of appeals concluded that Dr. Read was free riding, it ended its inquiry and concluded that the restraint MXC sought to impose on Dr. Read was reasonable. But a rule of *per se non*-liability is fundamentally at odds with *Sylvania* and the analytical approach applied by other Circuits.

A correct analysis is illustrated by the Seventh Circuit's decision in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Incorporated*, 585 F.2d 821 (7th Cir. 1978). In that case, a licensor

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[6] The court of appeals' endorsement of MXC's conduct is particularly damaging here considering the economic realities faced by new entrants to this market. At SVH and McKennan, it would take a group of six or seven radiologists to replace MXC—an unlikely option for consumers considering Sioux Falls' geographic remoteness. Replacement of MXC at SVH and McKennan was also inhibited by the MXC/CPC contract, which guaranteed to MXC the referrals of CPC physicians on those hospitals' medical staffs. Tr. 391. Hence, if MXC can foreclose small scale entry (like Dr. Read) it can insulate its monopoly forever.

attempted to impose "pass over payments" on its licensee, ostensibly to cover promotional and advertising expenses. The court found that the payments had a "plausible theoretical justification." 585 F.2d at 829. But the court held that mere plausibility does not amount to actual justification:

> Even if there were some "free rider" effect from such advertising, the jury could easily have found that compensating an "invaded" licensee to the full proportionate extent of all of his advertising and promotion expenses went much further than needed for the limited articulated purpose. *Id.*

The Third Circuit applied a similar analysis in *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992). In that case, a prospective dealer was turned down for a BMW dealership. The manufacturer claimed that the prospective dealer threatened to be a "free rider." 974 F.2d at 1375. But the court found this defense to be pretextual, noting that the prospective dealer "asserts that he had been willing to conform to any service and facilities requirements that [the manufacturer] demanded." *Id. See, also, Eiberger v. Sony Corporation of America*, 622 F.2d 1068 (2d Cir. 1980). ("That a practice is not *per se* unlawful does not mean that it is *per se* lawful.")[7]

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[7] The proper analytical framework was also suggested by Professors Areeda and Hovenkamp in their discussion of the essential facility doctrine. They write:

> As with most non-*per se* claims, the plaintiff bears the burden of persuasion that the challenged conduct is unreasonable. Of course, the defendant should bear the usual burden of coming forward with some evidence of justification. But once it does, it should be the plaintiff's obligation to persuade the judge or jury that the justification should be rejected. Areeda and Hovenkamp, *Antitrust Law*, par. 773.

Commentators, including the present General Counsel of the Federal Trade Commission, have repeatedly noted the need for guidance from this Court on the proper analytical framework in the refusal to deal context. *See, e.g.*, Calkins, S., *Supreme Court Antitrust 1991-92,* Antitrust Law Journal, Winter 1993 ("The [*Kodak*] Court was maddeningly silent, moreover, on burdens of proof."); Jorde and Teece, *The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors,* Antitrust Law Journal, Winter 1993 (suggesting that once plaintiff proves anticompetitive conduct defendant may attempt to justify that conduct and plaintiff may rebut by showing the justifications are pretextual). As demonstrated below, had the court of appeals applied the type of disciplined analysis adopted by other Circuits, it would have found the jury had ample evidence to conclude that MXC's conduct was anticompetitive, and caused Dr. Read injury.

3. MXC's demand for a "penalty payment" was anticompetitive

The "coverage contract" demanded by MXC of Dr. Read did not contain a price term. The court of appeal's conclusion that it was "reasonable" thus suggests that, as a matter of law, MXC could impose *any* cost it wished on Dr. Read. But there was more than sufficient evidence for the jury to have concluded that even a demand for one dollar would have been anticompetitive.

First, the fact that MXC did not incur any costs to accept cases from Dr. Read's customers was established by the fact that MXC did not seek similar payments from other physicians who, like orthopedic surgeons, often read their own films and sought to use MXC only on occasion. MXC's Dr. Wierda's explanation of the difference in treatment revealed

that the demand for a payment from Dr. Read was a naked restraint:

> Q. You testified previously [Dr. Hovensten] is a competitor of yours also, right?
>
> A. Dr. Hovensten is an orthopedist. Dr. Hovensten has an x-ray room in his office. He takes and interprets radiographs. And in that form, yes, is a competitor.
>
> Q. Okay. And on occasion, however, MXC will interpret films for Dr. Hovensten, will they not?
>
> A. On an outpatient basis, I can't recall him referring cases to us. On a hospital basis, we may have to do a CT scan on a patient of his, an operative film, yes, that is true.
>
> Q. Do you charge that competitor a fee for the right to refer a case to you?
>
> A. No.
>
> Q. Not even a dollar, right?
>
> A. No. But you, again, are comparing—
>
> Q. So what is it you want to tell me between the difference with Dr. Hovensten and some other situation?
>
> A. Well, Dr. Read's situation is entirely different than Dr. Hovensten. Dr. Read is a competitor. He's a radiologist. So the situation is not comparable. Tr. 1348-49.

In other words, the defendants' own testimony was not that Dr. Read was charged to avoid free riding; he was charged because he was a direct competitor.

Second, the jury's conclusion that MXC's demand for a penalty fee was unjustified was also supported by testimony that in competitive markets, such a fee was unheard of. As put by Tom Bradshaw, a hospital administrator called as an expert witness by Dr. Read:

Q. Have you ever seen a contractual arrangement where one radiology group required another radiologist to pay both a fee for the service and turn over the entirety of the bill from the patient?

A. No. I've never seen that. Tr. 1895.

Third, MXC could not even justify a special fee from Dr. Read for MXC's handling of his customers' referrals "after hours." MXC's standard billing structure included an "after hours" fee that it was free to charge late night patients. Exh. 289. Assuming MXC did have costs unrecoverable through its standard fee, MXC's ability to recover this cost from the patient eliminates any free rider problem. *See, Chicago Professional Sports L.P. v. National Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) (Easterbrook, J.) ("What gives this name free riding is the lack of charge . . . when payment is possible, *free* riding is not a problem because the 'ride' is not free.")[8]

And *fourth*, even assuming *arguendo,* that if MXC was incurring a cost in serving Dr. Read's customers, Dr. Read, like the prospective dealer in the *Big Apple BMW* case, was more than willing to pay for it by serving MXC customers at times when MXC physicians were not available. Tr. 1766.[9]

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[8] The anticompetitive nature of MXC's conduct is demonstrated by the fact that MXC wanted to collect this "after-hours" fee from its patient *and* another "penalty fee" from Dr. Read.

[9] It should also be noted that Dr. Read, like the respondents in *Eastman Kodak v. Image Technical Services*, 504 U.S. at 485, had invested substantially in this market. Prior to leaving MXC, he had spent 15 years working at Sioux Falls hospitals and serving referring physicians there.

D. The Eighth Circuit's Holding That A Contract—Which Forecloses Rivals—Can Be Excused As A "Customary Practice" Creates A Conflict In The Circuits

The Eighth Circuit also committed legal error by referencing the community practice of "paying MXC compensation" and then approving the practice as the "medical community's normal coverage practices". (App., 6a.). In other words, the Eighth Circuit uses the term "medical community" to describe the community in which MXC, an admitted monopolist, is the only member.

The court of appeals thus reduced the antitrust laws to protecting the business practices prevalent in a market, even if that market is dominated by a monopolist. This approach disregards the important role the antitrust laws play in determining what is and is not acceptable business behavior. It also creates a split in the Circuits on this important standard of conduct issue. *See, Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 998 (D.C. Cir. 1977) ("It is settled, moreover, that evidence of customs and practices in an industry is irrelevant in determining whether the defendant has violated the antitrust laws").

The Eighth Circuit's decision undermines the ability of the antitrust laws to condemn conduct which injures consumer welfare. For example, the Eighth Circuit did not find that consumers are better off under the "medical community's normal coverage practices," nor did it find that those coverage practices enhanced competition rather than destroyed it. Thus, the Eighth Circuit's reliance upon the "medical community's normal coverage practices" is legally erroneous and is a dangerous precedent for the future. If MXC's imposing a non-cost-based fee on a competitor in order to accept referrals from the competitor's customers is an appropriate business practice, then, as health care

markets continue to consolidate, that conduct may become a practice norm.

E. The Court of Appeals' Analysis Also Undermines *Continental Ore*

The court of appeals erroneously concluded that the "coverage contract" was "reasonable," and that Dr. Read's losses were "self-inflicted." In doing so, the Eighth Circuit broke with this Court's precedent and opinions of other Circuits in not considering the effect of MXC's exclusionary practices as a whole.[10]

The jury's focus on the entirety of MXC's conduct is precisely the approach mandated by *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S. Ct. 1404 (1962). In *Continental Ore*, which was a causation case, the defendants were charged with acquiring control over certain ore deposits and with refusing to sell the ore to their competitors. According to this Court, the court of appeals "examined seriatim" the various anticompetitive ventures and "ruled separately upon the respondents' alleged damage to [plaintiff] in connection with each of these episodes." 370 U.S. at 698, 82 S. Ct. 1410. But this

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[10] Significantly, the jury did not have to find that the "coverage contract" itself was illegal in order to find in favor of Dr. Read. The jury was instructed that MXC's refusal "to cover [Dr. Read's] diagnostic radiology practice" was lawful. Instruction 19C. But that did not end the inquiry. Like the *Aspen* jury, the jury here was also instructed that it could consider whether MXC declined to "cover" Dr. Read for legitimate business reasons, or, whether it engaged in that conduct to further its dominance in the market. Having found in favor of Dr. Read, "[the Court] must assume that the jury concluded that there were no valid business reasons" for the restraint, in light of the entirety of MXC's conduct. *Aspen,* 472 U.S. at 604-5, 105 S.Ct. at 2858-9.

Court rejected that type of narrow compartmentalizing, holding that "[i]n cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 699, 82 S. Ct. at 1410. The *Continental Ore* approach has been almost uniformly followed by other Circuits.[11]

The effect of the court of appeals' overly narrow focus is illustrated by its finding that the coverage contract was "reasonable." This conclusion is reached without mention of the MXC/CPC contract (which was enjoined by the district court as a market restraint)[12] or the *per se* wrongful market division scheme (which the district court found to be the most egregious of MXC's anticompetitive acts). The same approach is seen in the court's finding that, "Read's lack of coverage cannot be blamed on MXC." App., 6. This conclusion, which is based on Dr. Read's refusal to accept the "coverage contract," ignores *inter alia* the use of restrictive covenants in the MXC's employment contracts and MXC's market division scheme that inhibited the formation of rivals who could have associated with Dr. Read. Thus, MXC prevented Dr. Read from creating a firm which could satisfy all of its customers' needs at all times, and then used Dr.

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[11] *See, City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1981); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Associate Radio Service Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). *But, see, Cal. Computer Products v. Intern. Business Machines*, 613 F.2d 727 (9th Cir. 1979) ("There can be no synergistic result such as [plaintiff] claims from a number of acts none of which show casual antitrust injury to [plaintiff]").

[12] Ironically, and without discussion, the court of appeals concludes that Dr. Read should have also sought an arrangement like the MXC/CPC arrangement.

Read's inability to create such a firm to brand him a "free rider."

II.

THE MONOPOLIZATION STRATEGY APPROVED BY THE COURT OF APPEALS HAS BROAD APPLICATION

A. The Antitrust Issues Involved In This Case Need Clarification And Reinforcement

The holding in this case undermines long-standing economic insights, bolstered by recent economic analysis, concerning the ability of monopolists to maintain power by raising rivals' costs.[13] The Eighth Circuit conceded that the purpose of MXC's contract was to raise Dr. Read's costs, but the court *praised* this goal as designed to prevent "price-chopping" by a supposedly free riding Dr. Read. The court's decision paves the way for exclusionary conduct. Any service provider with market power trying to disadvantage its rival by raising the rivals' costs will now cite the Eighth Circuit's opinion to claim that its conduct was simply designed to prevent free riding.

A monopolist might try to maintain its monopoly power by raising barriers to entry and disadvantaging new entrants. The monopolist can carry out this strategy in a number of ways in the common situation where the customers need to continue to do some business with the monopolist. *See*, *Lorain Journal*. One way is to reduce the available pool of customers for the entrant. This can be done by forcing consumers to make an all-or-nothing choice between the monopolist and the entrant—e.g., MXC's contract requiring CPC physicians to use MXC for SVH referrals.

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[13] Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

Another way is to impose costs on the rival's potential customers by charging them a higher penalty price if they purchase any services from the entrant. In such a case, the entrant will need to compensate the customers for these higher costs, in essence paying the penalty to the monopolist itself. This places the entrant at an effective cost disadvantage in the market that may doom its entry. MXC used this technique too, when it sought to impose a penalty payment on Dr. Read.

The court of appeals' endorsement of MXC's strategy turns the antitrust laws on their head. These laws are not hostile to would-be "price-chopping" competitors in monopolized markets. MXC is a monopolist charging a monopoly price. Dr. Read was attempting to improve consumer welfare by competing with MXC. Unless the Eighth Circuit's decision is reversed, consumers everywhere will be the victims.

B. The Case Has Special Significance In Light Of The National Interest In Competitive Health Care Markets

The Government has promulgated health care policy statements that implicitly recognize that competition in health care markets is a national priority. *U.S. Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in the Health Care Area* (August 1996) The problem faced by Dr. Read is often encountered in health care markets where competing physicians work side-by-side in the delivery of medical care, and where consolidation of physician groups is increasing.[14]

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[14] Refusals to deal have been a persistent problem in health care markets. The FTC has a long history of enforcement directed

(continued...)

Much of this consolidation is beneficial, as it eliminates excess capacity. But all observers of the health care marketplace will understand the *carte blanche* nature of the Eighth Circuit's opinion. They will all know and immediately recognize that Dr. Read was being told he had to pay a penalty to a monopolist or face discrimination, and that this sort of practice is unheard of in ordinary medical practices. That such blatantly exclusionary activity was deemed valid as a matter of law, and despite monopoly power and a properly instructed jury's finding of exclusionary behavior, will be seen as a green light for anticompetitive behavior in these markets.

Finally, this case presents this Court with an opportunity to reaffirm that the antitrust laws apply to the health care industry, which comprises one-seventh of the American economy. In no other industry has public and private antitrust enforcement been as active as in the health care industry. But the Eighth Circuit's summary disposition of this case reflects a judicial approach which resists application of the antitrust laws to health care markets, irrespective of its implication for consumers.[15]

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[14] (...continued)
towards the type of "refusals to deal" by physicians seen here. For example, consent orders restricting physician groups' refusals to deal have been obtained by the FTC in the following matters: 59 FR 4889 (In Re: Medical Staff of Good Samaritan Regional Medical Center, Proposed Consent Agreement); 53 FR 18273 (Medical Staff of Doctors' Hospital of Prince Georges County, Consent Order); 56 FR 28911 (Medical Staff of Broward General Medical Center, Proposed Consent Agreement); 50 FR 41693 (Health Care Management Corp., Proposed Consent Agreement).

[15] See, Comments of Kevin O'Connor, Chair, National Association of Attorney Generals Multi-state Antitrust Task Force, Antitrust Law Journal, Spring 1996 ("[S]tates have a vital interest in preventing the evisceration of the antitrust laws as applied to health care.")

CONCLUSION

For the reasons stated above, Dr. Read respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

RICHARD R. WINTER
(Counsel of Record)
HENRY S. ALLEN, JR.
GEORGE M. SANDERS
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, IL 60661
(312) 715-5700

STEVEN W. SANFORD
CADWELL, SANFORD,
DEIBERT & GARRY, LLP
120 North Phillips Avenue
Sioux Falls, SD 57102
(605) 336-0828

Counsel for Petitioner

Of Counsel:

STEPHEN F. ROSS
University of Illinois
College of Law
Champaign, IL 61821
(217) 333-2502

110 F.3d 543 printed in FULL format.

Ralph Read, M.D., Plaintiff-Appellee, v. Medical X-Ray Center, P.C., a South Dakota professional corporation; Defendant-Appellant, Lynn A. Hendrickson; Daryl R. Wierda, Defendants. Ralph Read, M.D., Plaintiff-Appellant, v. Medical X-Ray Center, P.C., a South Dakota professional corporation; Lynn A. Hendrickson, M.D.; Daryl R. Wierda, M.D., Defendants-Appellees. Ralph Read, M.D., Plaintiff-Appellant, v. Medical X-Ray Center, P.C., a South Dakota professional corporation, Defendant-Appellee.

No. 95-3396SD, No. 95-3530SD, No. 95-3897SD

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

110 F.3d 543; 1997 U.S. App. LEXIS 6481;
1997-1 Trade Cas. (CCH) P71,763

October 21, 1996, Submitted
April 2, 1997, Filed

SUBSEQUENT HISTORY: [**1] Rehearing and Suggestion for Rehearing En Banc Denied May 9, 1997, Reported at: 1997 U.S. App. LEXIS 11331.

PRIOR HISTORY: Appeals from the United States District Court for the District of South Dakota. CIV 92-4095. Honorable John B. Jones, District Judge.

DISPOSITION: MXC's appeal reversed and Dr. Read's cross appeal affirmed.

COUNSEL: Counsel who presented argument on behalf of the appellant was John J. Miles, Washington, D.C. Additional attorneys appearing on the brief were Mark D. Baute, Los Angeles, CA; William Fuller, Frederick M. Entwistle and James E. Moore, Sioux Falls, SD.

Counsel who presented argument on behalf of the appellee was Richard R. Winter, Chicago, IL. Additional attorneys appearing on the brief were Henry S. Allen, Jr., Chicago, IL and Steven W. Sanford, Sioux Falls, SD.

JUDGES: Before FAGG, HEANEY, and HANSEN, Circuit Judges.

OPINION BY: FAGG

OPINION:

[*544] FAGG, Circuit Judge.

After twelve years as a partner in Medical X-Ray Center, P.C., a group of radiologists in Sioux Falls, South Dakota, Dr. Ralph Read quit and set up a competing independent practice. When his own practice failed, Dr. Read brought this antitrust lawsuit against Medical X-Ray Center and two of its doctors, Lynn A. Hendrickson and Daryl R. Wierda (collectively MXC), asserting MXC engaged in anticompetitive conduct and MXC's conduct prevented Read from competing successfully in the Sioux Falls area. A jury found in Dr. Read's favor on his Sherman Act conspiracy and monopolization claims. See 15 U.S.C. §§ 1, 2 (1994). Finding no evidence of conspiracy, the district court overturned the jury's verdict on Dr. Read's conspiracy claim and entered judgment as a matter of law (JAML). The district court upheld the jury's verdict on Dr. Read's monopolization claim, however, even though the court believed Read's practice

failed because of his practice's competitive [**2] shortcomings rather than any anticompetitive conduct by MXC. MXC appeals, and Dr. Read cross appeals. Viewing the evidence in the light most favorable to Dr. Read, see Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1505 (8th Cir. 1992), we conclude a reasonable jury could only find Dr. Read's business failed because of his own competitive flaws. Thus, Dr. Read did not establish causation, an essential element of his case, and we reverse on MXC's appeal and affirm on Dr. Read's cross appeal.

In 1987, Dr. Read decided his MXC work schedule was too rigorous. Dr. Read's family wanted to stay in Sioux Falls, but his contract with MXC contained a covenant not to compete for two years within a twenty-five mile radius of the city. Read proposed several options for reduced workload and compensation. Most were rejected, but MXC agreed to employ Read as an independent contractor and continued to include Read on its hospital schedules. Read left the partnership in 1988, worked as an independent contractor for a year, and renewed the contract for a second year. When the second contract expired, MXC offered to renew it, but Read told MXC he was being exploited and he [*545] intended to launch his own [**3] practice. According to Dr. Read, MXC's Dr. Soye told him MXC "would fight [him] every step of the way."

When he started his own business in June 1990, Read targeted only a hospital-based diagnostic radiology practice. For several years, MXC radiologists had been the only ones practicing at Sioux Falls' largest hospitals, Sioux Valley Hospital (SVH) and McKennan Hospital. MXC rather than the hospitals scheduled the individual radiologists to ensure 24-hour coverage. Dr. Read in-

formed SVH, McKennan, and MXC that he was willing to take his fair share of night call and weekends, but that he would not be available himself 24 hours every day of the week. SVH had an open staff and Read had privileges to practice radiology, so Read posted schedules at SVH showing the hours he would be on the premises. On one schedule, Read indicated he would only be at SVH for three hours a day. Dr. Read carried a beeper, but the schedule stated any urgent work should be performed by other radiologists, that is, MXC doctors, when Read was not there.

Dr. Aspaas, SVH chief of staff at the time, felt SVH's primary care doctors should be able to choose between MXC or Dr. Read for their patients' radiology [**4] needs. When Dr. Aspaas suggested a choice card system, Read proposed language that would permit SVH's physicians to choose Read to interpret their x-rays if he was available, but to default their choice to MXC if Read was not at the hospital. MXC would not agree to become Dr. Read's safety net, however. Instead, the choice card system put in place allowed doctors to choose between MXC and Dr. Read's independent practice on a case-by-case basis. Dr. Read then sent letters to the SVH doctors advertising quality care at prices well below MXC's. MXC did not retaliate against the SVH doctors who chose Dr. Read, but actually provided coverage when Dr. Read was not there.

MXC was willing to incorporate Read on its SVH schedule to ensure 24-hour coverage of his patients if Dr. Read signed a coverage contract and provided his own schedule in advance. The proposed contract stated Read would pay MXC an unspecified sum to cover Read's cases when Read was not on SVH premises, and MXC would

bill the patients directly for its services. Read did not acknowledge the offer for three months because he thought it was a practical joke. Read believed MXC had an ethical obligation to cover his patients, [**5] and he did not have to pay MXC anything for backing him up. In February 1991, Read informed MXC of his refusal to negotiate a coverage contract for any price. Around the same time, Dr. Read accepted a fellowship at the University of Nebraska Medical Center in Omaha that he had applied for the previous December.

On appeal, MXC asserts the district court should have granted JAML on Read's § 2 monopolization claim because the failure of Read's practice was caused by the practice's deficiencies rather than any predatory conduct by MXC. According to MXC, Read caused his own injury by failing to provide 24-hour service for his patients and by refusing to work a reasonable schedule. On the other hand, Dr. Read contends his practice failed because MXC had foreclosed every viable practice option by refusing to cooperate at SVH, entering into exclusive contracts at the other hospitals and the Central Plains Clinic, and placing restrictive covenants in MXC's employment contracts. Having carefully reviewed the record, we agree with MXC that Dr. Read caused his own business's demise.

To prevail on his antitrust claims, Dr. Read had to show a reasonable jury could find MXC's allegedly anticompetitive [**6] conduct was "a material cause" of his injury. National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found., 64 F.3d 1130, 1135 (8th Cir. 1995), cert. denied, 134 L. Ed. 2d 779, 116 S. Ct. 1676 (1996); Amerinet, 972 F.2d at 1490; see Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324,

1335 (10th Cir. 1996) (causation requirement applies to private plaintiffs seeking to invoke antitrust laws), pet. for cert. filed, 65 U.S.L.W. 3611 (Feb. 26, 1997) (No. 96-1365). A material cause is a "substantially contributing factor." National Ass'n of Review Appraisers, 64 F.3d at 1135. Dr. Read cannot recover if the decline of his [*546] business was attributable to causes other than MXC's behavior. Id.

As the district court observed, Dr. Read did not take reasonable steps to compete head-to-head with MXC in the inpatient radiology market. The hospitals and primary care doctors desired 24-hour service for their patients. MXC provided this service, and Dr. Read did not. When MXC proposed a reasonable written contract that would have solved Dr. Read's coverage problem, Read refused to discuss the proposal. Thus, Read's lack of coverage cannot be blamed on MXC. Dr. Read [**7] made the voluntary choice not to provide round-the-clock service, either by doing it himself, or by hiring someone else, and this was his downfall. Dr. Read presented no evidence that any individual MXC doctor wanted to cover Dr. Read but could not because of MXC's restrictive covenants. Simply put, Read was trying to force MXC to cover his business without following the medical community's normal coverage practices—paying MXC compensation for the service or agreeing to back up MXC doctors in exchange. Read wanted to "free-ride," avoid the cost of 24-hour coverage by forcing MXC to provide it to him for free, so he could undercut MXC's prices.

Read's lack of coverage cost him business at SVH and McKennan. Some SVH doctors who initially chose Dr. Read switched to MXC when Dr. Read told them he could not provide 24-hour coverage. When McKennan ex-

pressed concern to Dr. Read about his coverage deficiency, Dr. Read did nothing to address it. McKennan then made a unilateral decision to deal with MXC exclusively, despite MXC's refusal of an exclusive contract, because of concerns about patient care.

As for other potential clients, Dr. Read made little or no effort to pursue them. The Sioux [**8] Falls Veterans' Administration (VA) Hospital had an open bid process for an exclusive contract. Dr. Read did not submit a bid, even though his restrictive covenant had expired before the bidding closed. MXC submitted the lowest bid and was awarded the exclusive contract. Similarly, Dr. Read failed to compete for a contract at Central Plains Clinic (CPC). The CPC business manager testified Dr. Read never asked for clinic business, and Read admitted he never made "a special effort to seek them out." At Canton-Inwood Hospital, a facility twenty miles from Sioux Falls, Dr. Read refused to commit to a partnership with the MXC radiologist who had an independent contract there, so the radiologist sought the help of other MXC doctors. As for the SVH Outreach program, SVH alone decided not to use Dr. Read because of his limited availability. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1459, 1462 (11th Cir. 1991) (no causation under §§ 1 or 2 where radiologists, regardless of their personal wishes, were not causally responsible for hospital's unilateral decision to deny competing radiologist privileges).

We conclude no reasonable jury could find MXC's conduct was a "substantially [**9] contributing factor" to the failure of Dr. Read's independent practice. National Ass'n of Review Appraisers, 64 F.3d at 1135. The decline of Dr. Read's business was caused by factors other than MXC's

allegedly anticompetitive behavior. See id. Dr. Read rejected MXC's offer to negotiate a formal coverage agreement, did not respond to McKennan's concern that he would not cover his practice there, did not compete with MXC for contracts at the VA and CPC, and was excluded from the SVH Outreach program and Canton because of unilateral decisions by their administrators. Thus, the district court properly granted JAML on the § 1 conspiracy claim, and should have granted JAML on the § 2 monopolization claim as well. See id. at 1136 (causation is an essential element of 15 U.S.C. §§ 1, 2 claims).

Given the absence of causation, we need not decide whether MXC engaged in illegal anticompetitive behavior. See id. at 1134. Nevertheless, we believe Dr. Read's injury was caused by legitimate competition rather than anticompetitive conduct. In our view, MXC's insistence on a coverage contract from a price-chopping competitor was not unreasonable or anticompetitive. See Blue Cross [**10] & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1413-14 (7th Cir. 1995), cert. denied, 134 L. Ed. 2d 233, 116 S. Ct. 1288 (1996); Konik v. Champlain [*547] Valley Physicians Hosp. Med. Ctr., 733 F.2d 1007, 1014 (2d Cir. 1984). MXC had legitimate business justifications for its actions towards Dr. Read. See Trace X Chem., Inc. v. Canadian Indus., 738 F.2d 261, 266 (8th Cir. 1984); Konik, 733 F.2d at 1014.

We now turn to the points raised in Dr. Read's cross appeal. Given our rejection of the monopolization claim for lack of causation, the district court properly dismissed the attempted monopolization claim. Absence of causation also disposes of the tortious interference claim. See National Ass'n of Review Appraisers, 64 F.3d at 1137. Because we have reversed Dr. Read's only prevail-

ing claim, we need not consider his arguments about certain jury instructions, which are unrelated to our decision, future damages, and dismissal of the individual defendants. Since Dr. Read suffered no antitrust injury, we reverse the award of attorney fees. See 15 U.S.C. § 15(a).

Without doubt, an independent practice is a challenging undertaking. Dr. Read sought the perks of independent practice, [**11] setting his own hours and not having to deal with other partners, without one of the drawbacks, always being on call. Dr. Read chose not to provide the coverage and availability offered by his competitor, MXC, and for this reason potential clients chose MXC over Dr. Read's competing practice. Dr. Read's problem is, the antitrust laws were enacted to protect competition, not competitors. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

Accordingly we reverse the district court's judgment on MXC's appeal, and we affirm the district court's judgment on Dr. Read's cross appeal.

RALPH READ, M.D., Appellee/Cross-appellant, vs. Medical X-Ray Center, P.C., a South Dakota professional corporation, Appellant/Cross-appellee

No. 95-3396/95-3530/95-3987

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

1997 U.S. App. LEXIS 11331

May 9, 1997, Decided

PRIOR HISTORY: [*1] civ-92-4095

Original Opinion of April 2, 1997, Reported at: *1997 U.S. App. LEXIS 6481.*

COUNSEL: Counsel who presented argument on behalf of the appellant was John T. Miles, Washington, D.C. Additional attorneys appearing on the brief were Mark D. Baute, Los Angeles, CA; William Fuller, Frederick M. Entwistle and James E. Moore, Sioux Falls, SD.

Counsel who presented argument on behalf of the appellee was Richard R. Winter, Chicago, IL. Additional attorneys appearing on the brief were Henry S. Allen, Jr., Chicago, IL and Steven W. Sanford, Sioux Falls, SD.

OPINION: Order Denying Petition for Rehearing and suggestion for Rehearing En Banc.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 9, 1997

App. 11

[Dated September 14, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RALPH READ, M.D., Plaintiff, -vs- MEDICAL X-RAY CENTER, P.C., a South Dakota professional corporation, Defendant.	CIV 92-4095 MEMORANDUM OPINION AND ORDER ON POST-TRIAL MOTIONS

Appearances:

For the Plaintiff

Mr. Steve Sanford
Attorney at Law
P.O. Box 1157
Sioux Falls, SD 57101

Mr. Richard Winter
Attorney at Law
500 W. Madison
40th Floor
Chicago, IL 60661

For the Defendant

Mr. William Fuller
Attorney at Law
310 South First Avenue
Sioux Falls, SD 57102

Mr. Mark Baute
Mr. William Tsu
Attorneys at Law
611 6th St.
Twentieth Floor
Los Angeles, CA 90017

This case is a civil antitrust action in which the plaintiff alleges claims under Sections 1 and 2 of the Sherman Act. The case was tried to a jury that rendered a verdict for the plaintiff and awarded him damages of $608,000 which was subsequently tripled. The jury trial commenced on January 31, 1995 and concluded on February 20, 1995. Post-trial motions were heard on June 19, 1995.

Defendant filed a Petition for Certification of Judgment on Jury Verdict Pursuant to Fed.R.Civ.P. 54(b), Doc. 508, which was summarily denied.

The following post-trial motions were taken under advisement:

1. Defendant's Motion for Judgment as a Matter of Law, or Alternatively, For a New Trial, Doc. 516.

2. Plaintiff's Motion for New Trial and to Alter or Amend Judgment, Doc. 519.

3. Plaintiff's Petition for Attorneys Fees, Doc. 521.

4. Plaintiff's Petition for Injunctive Relief, Doc. 525.

I. Background

Defendant Medical X-Ray Center, P.C. (MXC) is the only radiology group practicing in Sioux Falls, South

Dakota. Plaintiff Ralph Read (Read) is a radiologist who worked either as a partner or employee of the defendant for 15 years. The facts as they relate to the respective motions will be discussed with the motions.

II. Defendant's Motion for Judgment or New Trial

Defendant has moved for judgment as a matter of law on the issue of liability or alternatively for a new trial on the issue of damages. These issues have been briefed separately and will be considered separately herein.

On a motion for judgment as a matter of law the evidence must be viewed in the light most favorable to the prevailing party. *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987). The Court is not allowed to "reweigh the evidence or to reach a different result as long as there is sufficient evidence in the record from which the jury could reasonably conclude [as it did]." *Id.* "If there is any evidence to support the jury's finding that the elements of the [ ] claim were proven, the jury's verdict must be upheld." *Id.*

I. Defendant's Motion on Liability

Defendant's motion for judgment or new trial on the issue of liability is based on the following six grounds which will be considered separately:

a. Plaintiff's failure to prove a proper product or geographic relevant market;

b. Plaintiff's failure to prove monopoly power;

c. The lack of any evidence of predatory conduct or market foreclosure;

d. The lack of any evidence supporting a conspiracy;

e. Plaintiff's failure to prove anti-trust injury; and

f. Plaintiff's lack of anti-trust standing.

a. Relevant Market

The relevant market selected by plaintiff in this case was the hospital inpatient diagnostic radiology services market within a 25-mile radius of Sioux Falls, South Dakota.

This is a very limited relevant market based on Dr. Monica Noether's testimony and on the fact that plaintiff sought only to engage in an inpatient diagnostic radiology practice.

At least one circuit court has held the relevant product market consisted of all radiology services, rather than being divided into inpatient and outpatient markets. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489-90 (9th Cir. 1991). The plaintiff in *Morgan*, sought to define the relevant product market as "referrals to Tucson nonuniversity medical radiologists." *Id.* The Court held there was not sufficient evidence to exclude university and osteopathic radiologists' services from the relevant market. *Id.* The Court also determined insufficient evidence existed to exclude from the relevant market the radiology services performed by nonradiologists. *Id.*

The jury in this case found plaintiff's market to be a proper relevant market. Defendant has suggested no other relevant market that would be applicable to this case. I am unwilling to grant a new trial on this issue.

b. Monopoly Power

The defendant clearly has the only radiology group practice in the Sioux Falls area, although individual practicing physicians and clinics sometimes read their own x-rays. As such, it has about ninety percent of the relevant market, that is, it does most of the inpatient radiology work in the Sioux Falls hospitals. The issue of monopoly power was a factual issue submitted to the jury in Instruction 19, and the jury clearly found against the defendant on this issue. There is evidence in the record to support this finding.

c. Predatory Conduct or Market Foreclosure

There was evidence at trial which could support the jury's finding that defendant was guilty of predatory conduct as it related to other potential competitors. The most explicit evidence of defendant trying to keep others out of their business is trial exhibit 64, which is a letter from defendant to Dr. W.A. Boade warning Dr. Boade to stay out of defendant's "turf" in "MR" or defendant would start invading Dr. Boade's "turf" in nuclear medicine.

The primary issue of either predatory conduct or market foreclosure as it relates to plaintiff involved the issue of defendant providing back-up coverage for plaintiff's Sioux Valley Hospital practice. Plaintiff claimed at trial that defendant's refusal to provide back-up coverage to him foreclosed him from practicing diagnostic radiology in Sioux Falls. Evidence at trial demonstrated that defendant offered to provide such personal services for a fee. Trial exhibit 706. Plaintiff refused this offer and asserted he would not pay defendant even $1.00 for

back-up because defendant would be paid by patients for services rendered by defendant while covering for plaintiff. See trial exhibit 944. Evidence at trial indicated that one of the reasons plaintiff resigned from defendant was that he did not want to be on call, i.e. provide back-up, immediately after working a full day. The evidence is clear that plaintiff in establishing an inpatient radiology practice did not intend to provide any back-up for periods when he was not physically at the hospital.

The Court does not believe defendant was obligated to provide back-up services to plaintiff.

If one of the defendant's radiologists desires to obtain back-up coverage, he or she must pay either another of defendant's radiologist or a locum tenens radiologist to provide such services.

d. Conspiracy

The jury was given Instruction 15 which required them to find defendant and one or more other persons entered into contracts, combinations or conspiracies which had a substantially harmful effect on competition in the relevant market for them to find defendant liable under section 1 of the Sherman Act, 15 U.S.C. § 1. As defendant is the only radiology group in Sioux Falls, the only other potential participants in such a conspiracy would be the three hospitals in Sioux Falls. There was evidence that defendant had an agreement with Central Plains Clinic to do all of its radiology work, but this would not constitute evidence of a conspiracy to monopolize the hospital inpatient diagnostic radiology market.

A conspiracy exists where the persons involved had "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Morgan*, 924 F.2d at 1488 (citations omitted). Each hospital is separately discussed below.

Sioux Valley. Plaintiff's privileges to practice diagnostic radiology were not revoked by Sioux Valley Hospital. There was evidence at trial that Sioux Valley took several steps to assist plaintiff in establishing his radiology practice. For example, choice cards were sent to all of the physicians with privileges at Sioux Valley, allowing such physicians to choose either defendant or plaintiff to interpret their patients' x-rays. Plaintiff did practice at Sioux Valley for a period of time following his resignation from defendant.

Considering all the evidence at trial concerning Sioux Valley's efforts to assist plaintiff it is clear that Sioux Valley was not part of a conspiracy with defendant to exclude plaintiff from practicing radiology in Sioux Falls.

McKennan. The evidence establishes that McKennan Hospital wanted to enter into an exclusive contract with defendant for inpatient diagnostic radiology services, but that the defendant refused to enter into such agreement. It is clear that McKennan Hospital was satisfied with the services provided by defendant and wanted to deal exclusively with it.

Plaintiff was not allowed to practice radiology at McKennan once he was no longer a member of defendant based on McKennan's desire to use defendant for all of its radiology services. There is no evidence that defendant sought or encouraged plaintiff's exclusion from McKennan Hospital.

Evidence that McKennan Hospital used defendant exclusively did not establish that McKennan Hospital and defendant conspired to prevent plaintiff from practicing inpatient diagnostic radiology.

VA. Defendant has a written exclusive contract with the Veterans Administration Hospital (VA). Plaintiff was not allowed to practice radiology at the VA once he was no longer a member of defendant. However, there is evidence in the record indicating defendant had to compete with a radiology firm from Cincinnati, Ohio, for the VA contract and that plaintiff could also have submitted a bid for this contract.

Plaintiff contends a contract, as well as a conspiracy, is sufficient to impose liability under Section 1, however, an exclusive contract for the provision of medical services is not necessarily violative of Section 1, as has been held by several courts addressing this issue. *See BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n,* 36 F.3d 664, 667-68 (7th Cir. 1994).

e. Antitrust Injury

Defendant contends plaintiff wholly failed to establish causal antitrust injury because his damages proof at trial was insufficient and he was not a bona fide competitor in the radiology business. The issue of damages is discussed in section 2 of this opinion, and the issue of whether plaintiff was a competitor is discussed immediately below.

The Ninth Circuit has explained that "even a prospective participant in a market may suffer antitrust injury, if it has taken 'substantial demonstrable steps to enter

an industry and . . . is thwarted in that purpose by antitrust violations.'" *In Re Dual-Deck Video Cassette Recorder Antitrust Litigation,* 11 F.3d 1460, 1464-65 (9th Cir. 1993), *quoting Solinger v. A&M Records, Inc.,* 586 F.2d 1304 (9th Cir. 1978).

Plaintiff testified about the efforts he expended to obtain work at Sioux Valley, with the Outreach Program of Sioux Valley, with Dr. Leland Larson at Canton-Inwood and at the VA. Plaintiff explained he did not need an office outside of his home, or equipment to run his radiology business, because he was seeking to compete only in the hospital inpatient market where he could use the hospitals' equipment in reading x-ray films and intended to maintain an office in his home. As far as plaintiff's billing procedure, he testified his wife assisted him in billing his patients.

Plaintiff's business plan was to develop a clientele of referring doctors by charging fees for reading x-rays which were dramatically lower than those charged by defendant, and to offset this lower business income by eliminating all normal business expenses of having an office, staff or equipment. His plan was based on requiring defendant to cover his practice without any cost to him, since he clearly did not intend to cover his practice in any way when he was not physically present in the hospital. He was unwilling to enter into any contractual arrangement with defendant to cover his practice.

Plaintiff set up an extremely limited period of time at Sioux Valley Hospital when he would be available to read x-rays of inpatients of his referring physicians. Trial exhibit 659. With his stated hours of availability at only three hours a day, he needed a lot of coverage when he

was not there. In my opinion, the issue of coverage of plaintiff's practice is the most crucial issue in this case. A single medical practitioner with plaintiff's practice clearly could not generate sufficient income to pay anyone else to cover his practice when he was not available. It is clear from the record that the reason plaintiff left defendant was his almost pathological dislike of being on-call on evenings and weekends, and his unwillingness to hire others to do his on-call assignments, so he clearly did not intend to cover his practice himself by coming to the hospital whenever there was an x-ray for him to read.

It is clear to me plaintiff's primary impediment to development of a radiology practice was his unwillingness to work any kind of a reasonable work schedule and to make any provisions for covering his practice.

Plaintiff's cause of action is largely premised on the proposition that defendant had a duty to cover plaintiff's practice on plaintiff's terms, that is, without having any written agreement for doing so and without any payment, even nominal.

Plaintiff's desire to set up an inpatient diagnostic radiology practice was thwarted in my opinion not by antitrust violations but by his own unwillingness to make any reasonable attempt to cover his radiology practice when he was not physically in the hospital. He meets this unwillingness to cover with the position that defendant had an obligation to provide cover for his practice without having any agreement for doing so. In my opinion, defendant had no obligation to cover his practice, particularly in view of plaintiff's unwillingness to advise defendant when he was or was not going to be available.

I do not believe plaintiff ever became or took reasonable steps to become a bona fide competitor in the inpatient radiology market for the reasons stated.

f. Standing

Defendant contends plaintiff does not have standing to bring this antitrust action. Defendant asserts that plaintiff did not establish antitrust injury and that consumers of its services are the appropriate and efficient enforcers of the antitrust laws in this case.

Congress intended 15 U.S.C. § 15 to provide a broad private remedy for antitrust violations. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472-73 (1982). Therefore, although other persons may have been able to enforce the antitrust laws against defendant, plaintiff had standing to enforce such laws against defendant under 15 U.S.C. § 15. 2.

II. Defendant's Motion on Damages

There was extensive pretrial and trial attention to the issue of liability, but the same careful attention was not devoted to damages. Plaintiff's expert economist, Dr. Ralph Brown, prepared an opinion based on a number of assumptions. At some point in the plaintiff's testimony, the Court advised counsel it was the Court's opinion that there was no factual evidence in the record to support Dr. Brown's assumptions as disclosed in his pretrial computations. When Dr. Brown was called to testify, he made no reference to his pretrial computations.

The issue raised by this motion is whether there was sufficient evidence in the record to support the jury's damage computations. I conclude that there is, since there was considerable testimony with regard to radiologists' incomes. I do not find the damage verdict to be so large as to be unsupported by the evidence. Defendant's motion for a new trial on damages will be denied.

III. Plaintiff's Motion For New Trial or To Amend Judgment

Plaintiff seeks to have the judgment amended to include judgment against the individually named defendants who have been previously dismissed, and seeks judgment on the plaintiff's claim of tortious interference with business relations. Alternately, plaintiff seeks a new trial on these issues if the judgment is not amended as requested, and seeks a new trial on the issue of punitive damages and future damages.

This motion calls into question the decisions made on these issues during the trial. The Court holds the view that these issues were correctly decided during the trial and this motion will be denied in all respects.

IV. Plaintiff's Motion For Attorneys Fees

Plaintiff seeks attorneys fees and expenses in the amount of $1,384,274.02. Petition, p. 14.

The Supreme Court has instructed that the district court should award attorneys fees only in an amount "reasonable in relation to the results obtained." *Hensley v. Eckerhart,* 461 U.S. 424, 440 (1983). Therefore, attor-

neys fees may be reduced due to limited success at trial. *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990). The fee award may also be reduced "if the documentation of the hours is inadequate or if the hours were not reasonably expended." *Id.* Furthermore, in cases involving multiple claims "the hours spent on the unsuccessful claim[s] should be excluded in considering the amount of a reasonable fee." *Loggins v. Delo*, 999 F.2d 364, 369 (8th Cir. 1993), *quoting, Hensley*, 461 U.S. at 440. Defendants are not required to pay for duplication of services by plaintiffs' attorneys. *A.J. v. Kierst*, 56 F.3d 849, 864 (8th Cir. 1995).

In this case the jury was instructed on only two of plaintiff's nine claims and all of the individual defendants were dismissed prior to trial. Plaintiff's attorneys therefore spent a considerable amount of time pursuing unsuccessful claims. Plaintiff's attorneys also spent time pursuing several unsuccessful motions prior to and at trial. In addition the jury did not award plaintiff any future-14 damages. As discussed later in this opinion, plaintiff is entitled to injunctive relief only if he establishes a radiology practice in or near Sioux Falls. Plaintiff therefore obtained only limited success in this action.

During the depositions taken in this case, plaintiff was usually represented by two or three attorneys. The Court finds such duplication of services unnecessarily increased the amount of time expended in preparing plaintiff's case.

Plaintiff incurred substantial expenses pursuing opinions from experts who did not give their opinions at trial. For example, Dr. Young and Dr. Grazier, who were to testify regarding plaintiff's essential facilities claim, were

excluded at trial as cumulative. Dr. Brown's entire damages analysis was discarded at trial, due at least in part to a lack of evidence to support it.

a. Claimed Attorneys Fees

McBride Baker & Coles	Hours	Rate	
Henry S. Allen, Jr.	1,486.00	$250	$371,500.00
Richard R. Winter	3,170.65	180	570,717.00
Nancy L. Pionk	194.95	140	27,293.00
Other attorneys	89.40	var.	16,090.20
Total claimed, McBride, Baker & Coles			985,600.20

Cadwell, Sanford & Deibert	Hours	Rate	
Steven W. Sanford	840.20	$200	$168,040.00

Based upon plaintiff's limited success in this action, duplication of services particularly at depositions, and pursuit of cumulative expert testimony, some reduction of time claimed by the respective attorneys is required. There is no method of computing a reduction in claimed time with mathematical precision, but I have considered the total hours claimed and my perception of the involvement of counsel as shown on Plaintiff's Exhibits A and B and their participation in hearings and trial.

Mr. Allen appears to be the initial attorney involved in this case and the senior attorney involved. He was present throughout the trial but was involved in court only in connection with settlement of jury instructions. I conclude that his total hours should be reduced to 1,200 hours.

Plaintiffs Exhibit B indicates a historic rate of $210 for Mr. Allen, and I conclude that a rate of $200 would be a reasonable rate for his time.

Mr. Winter is the attorney devoting the most time to this case and appears to have had principal responsibility for pretrial proceedings and conduct of the trial. I conclude his total hours should be reduced to 2,500 hours. His historic rate started at $140 per hour and increased on Exhibit B to $180 per hour. While his success in this case may justify increasing his historic rate in the future, I conclude that a rate of $140 per hour would be reasonable in this case.

Based on these reductions, I conclude that Ms. Pionk's claimed fees should be reduced to 170 hours at $120 per hour. The other attorneys category will be reduced to 89 hours at the rate of $100 per hour.

Plaintiff's Exhibit indicates a historic rate of $120 for Mr. Sanford. His affidavit indicates that his agreement with the plaintiff was for $120 per hour in periodic billings with a total of $200 per hour to be charged after the case is concluded. I conclude that a reasonable fee for Mr. Sanford would be a fee computed at $140 per hour and that he should be allowed a total of 720 hours.

b. Allowed Attorneys fees

McBride Baker & Coles	Hours	Rate	
Henry S. Allen, Jr.	1,200	$200	$240,000.00
Richard R. Winter	2,500	140	350,000.00
Nancy L. Pionk	170	120	20,400.00
Other attorneys	89	100	8,900.00
Total claimed, McBride, Baker & Coles			619,300.00

Cadwell, Sanford & Deibert	Hours	Rate	
Steven W. Sanford	720	$140	$100,800.00

Plaintiff claims $79,364.40 for time expended by paralegals in preparing his case. The Eighth Circuit has held that "[w]ork done by paralegals is compensable if it is work that would have been done by an attorney." *Miller v. Alamo,* 983 F.2d 856, 862 (5th Cir. 1993). The rates claimed for paralegals in this case range from $25 per hour to $75 per hour. In reviewing the invoices issued by the attorneys in this case, Doc. 523, the Court finds paralegals performed some duties which were "purely clerical in nature," *Id.,* and spent an unreasonable amount of time completing some of the tasks assigned to them. Therefore, the Court finds the proper amount of paralegal fees recoverable by plaintiff is $50,000.00.

Plaintiff claims $11,311.42 for sales tax payable for fees earned by Steve Sanford. The Court is allowing Steve Sanford to recover $100,800.00 and the sales tax on such fees amounts to $6,048.00. While it is possible that McBride Baker & Coles will be required to pay some South Dakota sales taxes, the amount is speculative at this time, and no sales tax will be allowed on their fees.

Plaintiff claims expenses totaling $58,716.66 for photocopying ($35,537.76), postage and delivery ($7,739.64), secretarial overtime ($3,522.33), telephone ($4,494.04), facsimile ($7,099.95), and other expenses ($322.94). For the same reasons stated above in connection with attorneys fees, the Court will not allow all of the expenses claimed by plaintiff. *See DeGidio,* 920 F.2d at 533 (af-

firming a 75% reduction of allowed costs); *Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1074 (8th Cir. 1991) (affirming complete denial of expenses for telephone calls, expert witnesses, travel, photocopies, food and lodging, computer legal research, depositions and filing fees). The Court finds the following amounts are reasonable allowances for the respective expenses: photocopying $20,000.00; postage and delivery $6,000.00; secretarial overtime $0.00; travel $40,000.00; telephone $4,000.00; facsimile $5,000.00; other expenses $0.00.

The cost of computer research is not separately recoverable as an expense, rather it is to be factored into the attorney's hourly rate. *Standley v. Chilhowel R-School Dist.*, 5 F.3d 319, 325 (5th Cir. 1993). Therefore plaintiff's claimed expense of $10,506.53 for computerized research will not be allowed.

The following chart summarizes the fees and expenses claimed by plaintiff and the amounts allowed by the Court:

	Claimed	Allowed
Attorney Fees		
McBride Baker & Coles	$985,600.20	$619,300.00
Cadwell, Sanford & Deibert	168,040.00	100,800.00
Paralegals	79,364.40	50,000.00
Sales Tax - Sanford Firm	11,311.42	6,048.00
Sales Tax - McBride Firm	13,478.40	0.00
Photocopying	35,537.76	20,000.00
Postage and Delivery	7,739.64	6,000.00

Secretarial Overtime	3,522.33	0.00
Travel	57,252.41	40,000.00
Telephone	4,494.04	4,000.00
Facsimile	7,099.95	5,000.00
Computerized Research	10,506.53	0.00
Other	322.94	0.00
TOTALS	$1,384,274.02	$851,148.00

V. Plaintiff's Motion For Injunctive Relief

Plaintiff seeks to enjoin defendant from enforcing restrictive covenants in its employment agreements and from enforcing any exclusivity contract with Central Plains Clinic. Defendant objects thereto on the basis that plaintiff is no longer a participant in the Sioux Falls radiology market.

I conclude that all injunctive relief in this case should be conditioned on plaintiff's re-entry into the radiology business in the Sioux Falls market. If he does re-enter this market, defendant will be enjoined from (1) enforcing its employment contract non-compete covenants against any partners or employees who join plaintiff's radiology practice, and (2) from asserting any exclusivity agreement if plaintiff seeks to obtain radiology referrals from Central Plains Clinic.

CONCLUSION

For the reasons previously stated, defendant is entitled to judgment on plaintiff's Section 1 claims because in my opinion there is no evidence that McKennan Hospital,

Sioux Valley Hospital, or the Veterans Administration Hospital conspired with the defendant to prevent plaintiff from practicing inpatient diagnostic radiology in or near Sioux Falls.

With regard to plaintiff's Section 2 claim, it is my view that plaintiff's radiology practice in Sioux Valley Hospital failed because of his failure to provide coverage for his practice, and that defendant was not obligated to furnish such coverage in the absence of an agreement between the parties. I would find that plaintiff failed to prove an antitrust injury for the reasons set out in section II(1)(e).

However, this is a factual issue which was submitted to the jury under proper instructions and they found to the contrary. I feel obligated to yield my views of the facts to the jury's findings.

Many of the practices of which plaintiff now complains were adopted with his approval during the period he was a partner in defendant, but I conclude that is no defense in this case.

Therefore upon the record herein,

IT IS ORDERED:

(1) That Defendant's Petition for Certification of Judgment on Jury Verdict Pursuant to F.R.Civ. P. 54(b), Doc. 508, is denied.

(2) That Defendant's Motion for Judgment as a Matter of Law, or Alternatively, For a New Trial, Doc. 516, is denied.

(3) That Plaintiff's Motion for New Trial and To Alter or Amend Judgment, Doc. 519, is denied.

(4) That Plaintiff's Petition for Attorneys Fees, Doc. 521, is granted to the extent that plaintiff shall recover attorneys fees and costs from the defendant in the amount of $851,148.00, and is denied in all other respects.

(5) That Plaintiff's Petition for Injunctive Relief, Doc. 525, is granted to the extent that in the event plaintiff reestablishes a radiology practice in or near Sioux Falls, South Dakota, the defendant is enjoined from enforcing its employment contract non-compete covenants against any partners or employees who join plaintiff's radiology practice and from asserting any exclusivity agreement if plaintiff seeks to obtain radiology referrals from Central Plains Clinic, and is denied in all other respects.

Dated this _____ day of September, 1995.

BY THE COURT:

_____
Senior U.S. District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: _____
DEPUTY

(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RALPH READ, M.D.,	)	CIV92-4095
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED FINAL JUDGMENT
	)	
MEDICAL X-RAY CENTER, P.C., a South Dakota professional corporation,	)	
	)	
	)	
Defendant.	)	

The Court having entered its Memorandum Opinion and Order on post trial motions on this civil antitrust action, final judgment is entered, as follows; it is

ORDER, ADJUDGED AND DECREED that plaintiff Ralph Read, M.D. have and recover against Medical X-Ray Center, P.C. the sum of $1,825,695.00, together with post-judgment interest computed from the date of entry of the verdict herein; and, it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover its attorneys fees and expenses in the amount of $851,148.00; and, it is further

ORDERED, ADJUDGED AND DECREED the plaintiff's taxable costs in the amount of $_____ to be hereafter taxed and inserted by the Clerk of Courts in favor of the plaintiff.

Dated this ____th day of September, 1995.

_____
WILLIAM F. CLAYTON, Clerk

Supreme Court, U.S.
FILED
SEP 10 1997
CLERK

No. 97-263

In The

Supreme Court of the United States

October Term, 1996

RALPH L. READ, M.D.,

Petitioner,

vs.

MEDICAL X-RAY CENTER, P.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM P. FULLER
FREDERICK M. ENTWISTLE
JAMES E. MOORE
WOODS, FULLER, SHULTZ
& SMITH P.C.
300 South Phillips Avenue
Suite 300
Sioux Falls, South Dakota 57104
(605) 336-3890

JOHN J. MILES
Counsel of Record
OBER, KALER, GRIMES
& SHRIVER, P.C.
1401 H Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 326-5008

Attorneys for Respondent

71980 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

35 pp

QUESTIONS PRESENTED

The Respondent, Medical X-Ray Center, P.C., restates the questions presented as follows:

1. Whether the court of appeals erred in holding that the Petitioner failed to present substantial evidence that his injury and damages were caused by any unlawful conduct of the Respondent.

2. Whether, based on the facts presented at trial, Section 2 of the Sherman Act required the Respondent to provide coverage for the Petitioner's medical practice unconditionally on Petitioner's own terms.

PARTIES TO THE PROCEEDINGS

The Respondent, Medical X-Ray Center, P.C., has no parent or subsidiaries.

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STATEMENT OF THE CASE

A. Introduction

The Petitioner, Ralph L. Read, M.D., a former shareholder-employee of the Respondent, Medical X-Ray Center, P.C. ("MXC"), seeks review of the Eighth Circuit's decision that he failed to present substantial evidence that any unlawful conduct by MXC caused the damages he claimed. Read argued to the Eighth Circuit that "MXC has appealed only the rejection of its own version of the facts" (Appellee's Brief at I), and in his Petition for Rehearing that the "appellate panel's adoption of [MXC's] evidence violate[d] the Seventh Amendment prohibition against redetermination of jury verdicts" (Plaintiff/Appellee/Cross-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, Required Statement). Now changing strategy, he argues that the issues actually were questions of law that the Eighth Circuit decided incorrectly or that the court of appeals misapplied applicable antitrust principles to the facts.

The Eighth Circuit's decision does not warrant review by the Supreme Court of the United States. The legal principles applied by the court of appeals are well-established in antitrust jurisprudence; neither those principles nor the Eighth Circuit's application of them to the facts conflicts with principles enunciated by this Court or by any other court of appeals; and the decision implicates no overriding point of federal antitrust law on which guidance from this Court or other courts is lacking. Dr. Read merely asks this Court to review whether, as a factual matter, the injury he claimed was caused by any unlawful conduct of MXC. Both the district court and the court of appeals reviewed precisely that question with the record in front of them and answered no (although the district court felt constrained to hold otherwise because of the jury's verdict). There is no reason for this Court to review the same facts and question yet again.

B. The Relevant Facts

Dr. Read was a shareholder-employee of MXC, a professional corporation of radiologists in Sioux Falls, South Dakota, from 1975 to 1988. He resigned in 1988 because his perceived heavy workload and call schedule at MXC put him "in a very frustrated frame of mind" (Tr. 1436); he was "burned out" (*id.* 171); he was experiencing a "mid-life crisis" (*id.* 1451); and he did "not need the money that full-time work produces" (*id.* 1449). He was tired of his job and wanted to work part-time (*id.* 219-20), not taking call on nights and weekends as other MXC radiologists did (Ex. 841).[1]

Dr. Read first tried to persuade MXC to restructure its entire operation so that all its radiologists could work only when they wished. Tr. 1432-35. When this failed, he resigned because of "the way night call was scheduled" (*id.* 1786), even though he knew that he would leave MXC shorthanded (*id.* 1700-01, 1710-11).

After first telling MXC that he did "not intend to practice medicine for a year or more" (Tr. 1489-90), Read decided that he wanted to practice part-time. To accommodate him and because it was shorthanded, MXC entered into an independent-contractor agreement with Read by which it paid him a yearly salary for twenty weeks of work per year to help MXC with its cases. Under the contract, Read was not on MXC's call schedule for night, weekend, or holiday work. Although he sporadically took call cases,[2] he was inflexible and uncooperative in providing call coverage when

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1. Dr. Read now claims that he "sought to create a different practice style, one that emphasized quality of care rather than high incomes." Petition for Certiorari ("Pet.") 5. Neither the record, nor Read's citation for that proposition (Tr. 1450), supports that claim.

2. In Read's citation for this fact (Pet. 5, citing Tr. 1468), Read actually said, "I wasn't on the night call schedule or the weekend schedule."

requested, a problem that MXC experienced with him throughout his tenure as an independent contractor. *Id.* 2023.

About March of 1990, claiming that MXC had "exploited" him (Tr. 2031), Read decided to establish an independent solo radiology practice. He made little or no effort, however, to compete for business at what he now refers to as "the only point[s] of market entry" (Pet. i) for radiologists in Sioux Falls. Then, when his practice was not as successful as he wished, he left Sioux Falls for a radiology fellowship and brought this antitrust suit against his former partners alleging a number of purported predatory acts:

1. Read complains about MXC's exclusive contract with the Veterans Administration ("VA") hospital in Sioux Falls. Pet. 5. The VA had issued a request for proposals for a five-year exclusive contract and was considering vendors at the time Read decided to form his independent practice. Yet the uncontroverted evidence showed that (a) while at MXC, Read had wanted to "dump" the VA contract (Tr. 2584); (b) Read did not even submit a bid for the contract (*id.* 2159); (c) the VA, not MXC, demanded the long-term contract (*id.* 2123); (d) MXC won the contract after competitive bidding and after the VA negotiated MXC's price down (*id.* 2130); and (e) the VA was extremely happy with the contract (*id.* 2162, 2166).

2. Read also complains about the contract between MXC and Central Plains Clinic ("CPC"), a physicians group in Sioux Falls. Yet the evidence showed that (a) MXC obtained that business because it, in effect, offered CPC a lower price than in the past, a fact Read admits (Pet. 5); and (b) Read made little effort to compete for the contract (Tr. 1747-50).

3. Read claims that MXC entered into an exclusive contract with McKennan Hospital in Sioux Falls. Pet. 6. Yet the evidence showed that: (a) while McKennan tried to force MXC to accept an

exclusive contract, MXC continually refused (Tr. 2374-77); (b) McKennan could recruit other radiologists if it were dissatisfied with MXC (*id.* 342); (c) Read himself admitted that there was no exclusive contract (*id.* 1505); (d) there has been no exclusive contract to this day (*id.* 393); and (e) when Read told McKennan that he wanted to practice there, McKennan raised concerns about his ability to cover his practice, and Dr. Read never attempted to address those concerns (*id.* 349-51). Accordingly, McKennan made a unilateral decision to permit only MXC to read cases there (*id.* 2375) without any contract.

4. Read claims that MXC "enforced an exclusive contract at Canton-Inwood" Hospital, a short distance from Sioux Falls. Pet. 5. But the evidence showed that: (a) an MXC physician, by himself and apart from MXC, had the contract with Canton-Inwood (Tr. 1006); and (b) that physician was looking for a partner to work with him at Canton-Inwood and decided to look for someone else when Read refused to commit to become a partner (*id.* 1117-34).

5. Finally, Read complains that MXC refused to cover his part-time practice at Sioux Valley Hospital ("SVH") — that it "declined to accept *unconditionally* referrals from Dr. Read's customers." Pet. 3 (emphasis added). Mischaracterizing MXC's actions by employing emotional and pejorative false allegations that MXC "discriminated" against his customers and forced him to pay a "penalty payment" or "monopoly rent," Read argues that MXC had an absolute duty to provide coverage for him, on his unilaterally dictated terms, with no consideration of the practical issues and problems that its covering his practice would cause.

The evidence was uncontroverted that MXC offered to cover Read's practice if he would enter into a written coverage agreement by which he would inform MXC in advance when he planned to work at SVH and pay MXC an unspecified amount, to be negotiated, for the problems and costs that MXC would incur in providing him

with coverage. Read, however, flatly refused even to discuss any type of coverage agreement.

The evidence also disclosed a plethora of reasons why, without some type of agreement, MXC would be leery of providing the coverage that Dr. Read demanded. First, only after being forced to do so did Read even post a schedule indicating when he would be present at SVH to render services himself. Tr. 1579. As MXC doctors testified, the scheduling of its physicians to cover the different facilities at which it provides services was one of the most difficult, complex, and divisive functions of the group. *Id.* 156, 168. MXC typically established its schedule six months in advance. *Id.* 2066.

Second, Dr. Read did not even abide by the schedule he finally did post. As he admitted, after posting a schedule stating that he would be at SVH three hours a day, sometimes he was there more and sometimes less. Tr. 1411. Not surprisingly, both hospital and MXC personnel had difficulty reaching him when he was supposed to be available. Tr. 2049, 2613.

Third, MXC knew from past experience with Dr. Read that, as the district court explained, he had "almost a pathological dislike for providing night and weekend coverage" (Petitioner's Appendix ["Pet. App."] 20) and was uncooperative in trying to work out call coverage (Tr. 1351).

Fourth, when Read finally did post a schedule of availability, it stated that he would be at SVH only three hours a day during the week (and none on Thursdays) and one hour a day on weekends. *Id.* 1580, 1766-67. Thus, it was clear that Read's practice would be part-time at best. To cover Read's practice as he demanded, MXC would have to ensure that it had available capacity at SVH at the times when Read was absent during the workday. In addition, MXC would have to cover Read's practice during the least desirable work

times — nights, weekends, and holidays.[3] Even an SVH administrator testified that he was "not very comfortable" with Read's very limited hours of availability. *Id.* 1233.

Fifth, MXC physicians expressed concern about potential run-ins with Dr. Read after MXC read a test when Read was absent and Read appeared unexpectedly and complained that MXC had not left the test for him to read. Tr. 2048.

Dr. Read never approached MXC to request that the parties sit down and discuss an arrangement by which MXC would cover his practice. Tr. 142, 1771, 2268, 2605-06. When MXC physicians took the initiative to do so, they found it difficult to communicate with him. *Id.* 3267. Testimony showed that MXC, had Read been willing to discuss a coverage arrangement, would have tried to reach some type of agreement to provide coverage. *Id.* 2292.[4] Instead, Read attempted to force MXC to cover his practice whenever he might not be present through a so-called "choice card" system, by which referring physicians would choose between Read and MXC; but if Read were not present, MXC would be a default choice, obligated to cover Read's practice whenever Read, without informing MXC in advance, chose to be absent. MXC naturally objected to this procedure.

In an attempt to accommodate both Dr. Read's coverage demand and its own concerns, MXC took the initiative and had its attorney draft a proposed coverage agreement and send it to Dr. Read. The draft agreement provided that MXC would cover Read's

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3. Dr. Read's petition suggests that MXC's concerns about his availability were limited to night and weekend coverage — so-called "after hours." Pet. 18. That is incorrect. Rather, Read also expected MXC to cover his practice during the majority of all workdays.

4. The record showed that, as a factual matter, MXC did cover Read's practice. Tr. 1304-05, 1357, 2048-49.

practice if Read would provide MXC with his work schedule in advance and pay MXC a fee to be negotiated. Tr. 2060-61. Testimony showed that MXC's primary concern in seeking a written agreement was to lock Read into and obtain a schedule of his presence at SVH so that it could schedule its radiologists accordingly (*id.* 1356, 2060-65, 2070, 2612) and that MXC would have signed the contract if Read had paid it as little as one dollar. MXC's desire for the contract had "nothing to do with the money" (*id.* 2064).

Read waited almost three months before even acknowledging the draft. Tr. 1802-04. Calling it "some kind of practical joke" (*id.* 1601), he told MXC's attorney when they finally met to discuss the draft that he would not pay even one dollar for coverage (*id.* 1646-47, 1806-07). But it was not just the money to which he objected; rather, he rejected the rest of the contract as well. *Id.* 1649. He told MXC's attorney to stop working on any contract (*id.* 1648) and left town for a radiology fellowship for which he had applied before he responded to MXC's draft coverage agreement.[5] Ironically, it was Dr. Read, not MXC, who refused to deal.

C. The Decisions Below

1. After trial, the jury found that MXC violated both Sections 1 and 2 of the Sherman Act. The district court readily granted MXC's motion for judgment as a matter of law on Dr. Read's Section 1 claim. It held that the evidence failed to show any agreement with SVH (because Read could always practice there) (Pet. App. 17) or at McKennan (because although "McKennan . . . wanted to enter into an exclusive contract . . . the defendant refused

5. Read incorrectly refers to MXC's draft agreement as a "take-it-or-leave-it" offer. Pet. 7. That the money term in the contract was left blank and that the meeting between MXC's attorney and Read was to discuss provisions that the contract should include belie this statement. The draft contract was just that — a draft to start discussion.

to enter into such agreement") (*id.*). The court recognized that MXC did have an exclusive contract with the VA (which MXC did not dispute) but that MXC merely won a competitive-bidding contest and that "plaintiff also could have submitted a bid." *Id.* 18.

The district court came within an inch of granting MXC's motion for judgment as a matter of law on Dr. Read's Section 2 monopolization claim as well because it believed that Read failed to prove that any injury he suffered was caused by MXC rather than by his own shortcomings. Notwithstanding its view that Read's practice failed because of his own lack of effort, the court "yield[ed] [its] views of the facts to the jury's findings." *Id.* 29.

Numerous facts supported the district court's belief that Read, himself, caused any injury he suffered: (a) His "unwillingness to work any kind of a reasonable work schedule" and refusal to cover or obtain coverage for his practice (Pet. App. 20); (b) the obligation of MXC's radiologists to pay other radiologists for back-up when they did not want to take their scheduled call, but Read's refusal to do so (*id.* 16); (c) Read's refusal of MXC's offer of coverage, even if the cost were as little as one dollar (*id.* 15-16); (d) Read's business "plan [that] was based on requiring defendant to cover his practice without any cost to him" (*id.* 19); (e) Read's "almost pathological dislike of being on call nights and weekends" (*id.* 20); and (f) MXC's lack of obligation to cover Read's practice, "particularly in view of plaintiff's unwillingness to advise defendant of when he was not going to be available" (*id.*).

2. The court of appeals merely acted on the district court's conclusions. It, in effect, reminded the district court that juries are not infallible and that Rule 50 exists to permit trial courts to correct obvious mistakes. Specifically, and for almost the same reasons as the district court, the Eighth Circuit concluded that "a reasonable jury could only find that Dr. Read's business failed because of his own competitive flaws. Thus, Dr. Read did not establish causation, an essential element of his claim . . . ." Pet. App. 3.

The Eighth Circuit's opinion is far from the "summary disposition" that Dr. Read unfairly claims it is. Pet. 24. Rather the opinion itself shows that the court considered each instance of purported predatory conduct in reaching its decision. Because the parties' briefs had focused on Read's claim that MXC had caused his injury at SVH by refusing to cover his practice, the Eighth Circuit also focused on that issue. It recognized that MXC's primary concern in seeking a coverage agreement with Read was to ensure that MXC would know when it had to provide coverage: "MXC was willing to incorporate Read on its SVH schedule to ensure 24-hour coverage of his patients if Dr. Read signed a coverage contract and provided his own schedule in advance." Pet. App. 4. The court of appeals emphasized that Read did not even acknowledge MXC's offer of coverage for three months and then "informed MXC of his refusal to negotiate a coverage contract for any price." *Id.* 5. Accordingly, it concluded that "Read's lack of coverage cannot be blamed on MXC." *Id.* 6.

The court of appeals indicated that because of its decision on the causation issue, deciding whether MXC engaged in predatory conduct was unnecessary. In dicta, however, it explained that MXC's request for a coverage contract was not a predatory act because MXC had "legitimate business justifications" for its actions. Pet. App. 8. It considered that Read wanted to " 'free-ride,' avoid the cost of 24-hour coverage by forcing MXC to provide it for him for free, so he could undercut MXC's prices" (*id.* at 6, 8) and that MXC needed Read's schedule of availability (*id.* at 4). Accordingly, the court of appeals reversed the district court's decision denying MXC's motion for judgment as a matter of law on Dr. Read's Section 2 claim.

REASONS FOR DENYING THE WRIT

Rather than focusing on the Eighth Circuit's holding — that he failed to prove "causation," a requirement under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), for every plaintiff seeking

damages — Dr. Read focuses on the "predatory-conduct" element for monopolization liability under Section 2 of the Sherman Act, claiming that MXC refused to deal with him. But Dr. Read concedes, as he must, that MXC did not refuse to deal; the parties agree that MXC offered to provide coverage for Dr. Read's practice if he would enter into a coverage agreement with MXC. Thus, Dr. Read's petition has to focus almost exclusively on the question of whether Section 2 required MXC to provide coverage for his practice, to use Read's word, "unconditionally" (Pet. 3); that is, without Read informing MXC of when it would have to furnish coverage and with Read paying nothing for that coverage. Nothing in the antitrust laws required MXC to disrupt its own operations or to subsidize Read's practice so that he could work part-time.[6]

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6. Dr. Read raises two other minor points that merit little discussion. First, citing *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), he claims that the court of appeals focused only on the SVH coverage question rather than considering "MXC's exclusionary practices as a whole." Pet. 20-22. A reading of the court of appeals' opinion belies this argument. Although the court of appeals did not include any explicit statement to the effect that "Dr. Read, we have considered all your alleged predatory conduct together and do not believe that singularly or in combination, it constituted predatory conduct," the opinion shows clearly that the court did just that. The opinion discusses each alleged predatory act.

Second, Dr. Read argues that the court of appeals erred by holding that a contract that forecloses competitors can be excused as a "customary practice." Pet. 19-20. The court of appeals, however, did not hold or even suggest that this fact would dispositively resolve the question of whether MXC's request for a coverage agreement was predatory. The court simply mentioned it as one fact that, at most, it felt was relevant. Moreover, contrary to the language in *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 998 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), that such evidence is not relevant (Pet. 19), the fact clearly is relevant in determining whether particular conduct is predatory. That those without monopoly power engage in the same conduct is probative that the conduct has a legitimate business justification and is not undertaken solely to monopolize a market. *E.g.*, *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 927-928 (10th Cir.) (noting that ordinary business practices are not predatory), *cert. dismissed*, 423 U.S. 802 (1975).

Understandably, but erroneously, Read argues that the court of appeals' opinion indicating that MXC had no such obligation conflicts with decisions of this Court, conflicts with decisions of other courts of appeals, and involves a principle of law on which guidance is absent but necessary. The reason that Dr. Read's petition should be denied is simply that none of these arguments is correct.

I.

THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS.

A. The Decision Does Not Conflict With *Lorain Journal* Or *Aspen*.

Contrary to Dr. Read's assertion, neither *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), nor *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), are "directly applicable here." Pet. 11. Thus, it should have come as no surprise to Dr. Read that the Eighth Circuit did not cite them.

1. Unlike the defendants in *Lorain Journal* and *Aspen*, who refused to deal with their competitor, MXC did not refuse to deal with Dr. Read. It offered to negotiate a coverage contract, which he refused even to discuss. Because of Dr. Read's refusal, neither court below, unlike the courts in *Aspen*, could determine if a firm offer might have been made, what the terms of that offer might have been, or whether an agreement might have been reached. Dr. Read, rather than MXC, was the party that refused to deal.

2. Both *Lorain Journal* and *Aspen* hold that any duty to deal with competitors, even by a firm with monopoly power, is the exception rather than the rule. The firm has a "general right" not to deal, but that right is "qualified." *Lorain Journal*, 342 U.S. at

155; *see Aspen*, 472 U.S. at 600. "When such a duty is found, it must be treated as exceptional." IIIA Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 765b at 101 (1996) ("*Areeda & Hovenkamp*"). Under no circumstances, however, does any firm have an "unconditional" duty to deal on terms dictated unilaterally by its competitor. *See Illinois v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) ("Monopolists needn't acquiesce to every demand placed upon them by competitors or customers."), *cert. denied*, 502 U.S. 1094 (1992); *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 267 (8th Cir. 1984) (" 'Section 2 . . . does not give purchasers the exclusive right to dictate the terms on which they will deal,' . . . nor does it require a monopolist to accede to every demand of its competitors or customers"), *cert. denied*, 469 U.S. 1160 (1985).

3. As Dr. Read recognizes, conduct is not predatory if a legitimate business justification exists for it. Pet. 11 n.3 (*citing Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992)); *see generally* I ABA Section of Antitrust Law, *Antitrust Law Developments* 274-75 (4th ed. 1997) ("even if a monopolist's refusal to aid a competitor is based partly on a desire to restrict competition, antitrust liability may be avoided if the monopolist's conduct was also based on a legitimate business justification").

In *Lorain Journal*, the defendant newspaper made no attempt even to put forth, much less prove, a legitimate business justification for its refusal to accept advertising from customers who also advertised on the radio station, and thus the courts there had to look no further than the challenged conduct by itself. There was nothing more than a refusal to deal by a firm with monopoly power solely for the purpose of driving its competitor from the market. Indeed, this Court explained that the lower court "found expressly that the purpose and intent of [defendant's conduct] was to destroy the broadcasting company." *Lorain Journal*, 342 U.S. at 148-49.

Here, there was no such finding and could not have been; to the contrary, both the district court and court of appeals found that MXC requested a coverage agreement for other, legitimate reasons — an issue not even before the courts in *Lorain Journal*.[7]

4. This Court's decision in *Aspen*, if relevant to this case at all, supports MXC because its analysis clearly recognized that refusals to deal, even by firms with monopoly power, are not predatory if the refusal is justified by "any normal business purpose" or "any efficiency justification." *Aspen*, 472 U.S. at 608. In *Aspen*, as one commentator explained, "[T]he narrow issue before the Supreme Court was only whether there was evidentiary support for the implicit factual finding that there was no valid business reason for the defendant's conduct." Michael Malina, *Supreme Court Update — 1985*, 54 Antitrust L.J. 289, 293 (1985). This Court held there was such evidence, noting that "[p]erhaps most significant . . . , [defendant] did not persuade the jury that its conduct was justified by any normal business purpose." Indeed, the Court explained that the defendant "fail[ed] to offer any efficiency justification whatsoever." *Aspen*, 472 U.S. at 608.

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7. In addition, the factual situation in *Lorain Journal* is not analogous to that here. For *Lorain Journal* to be "directly applicable," not only would the legitimate-business-justification question have had to arise, but the radio station would have had to demand that the newspaper supply it with employees because it would be costly for it to hire its own so the radio station could stay on the air 24-hours a day, without telling the newspaper when its employees would have to work for the radio station. In that analogous situation, it seems highly unlikely that any court would have found that the newspaper's refusal to accede constituted predatory conduct. *Cf. Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377-78 (7th Cir. 1986) ("But [plaintiff] had no right under the antitrust law to take a free ride on its competitor's sales force. You cannot conscript your competitor's salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant."), *cert. denied*, 480 U.S. 934 (1987). *Olympia* can be distinguished on the ground that the defendant there was exiting the market, but that fact would not have changed the analysis or the result.

The situation here is the reverse: MXC did put forth and persuade both the district court (although it believed that it had to accept the jury's verdict) and the court of appeals that its actions were justified by a "normal business purpose." Read can and does argue that MXC's normal business purposes were invalid as a matter of law, but that was not the issue in, and so there is no conflict with, *Aspen*.[8] Read is simply wrong in arguing that under the Eighth Circuit's reasoning in this case, the plaintiff in *Aspen* would have been forced to accept the defendant's "coercive offer" there. Pet. 12. Here, the court of appeals indicated that MXC's offer was reasonable and justified. In *Aspen*, the courts found the opposite. There is simply no conflict between the analyses and results in *Aspen* and here.

B. The Decision Does Not Conflict With Any Other Decision Of This Court Or Of Any Court Of Appeals.

Perhaps realizing that neither *Lorain Journal* nor *Aspen* supports his arguments here, Dr. Read moves to the crux of his petition — that MXC had no legitimate business justification for requesting a coverage agreement as a matter of law. He appears to make three arguments: (1) that the prevention of free-riding may not constitute a legitimate business justification in Section 2 cases

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8. *Aspen* can be distinguished on a number of other grounds as well, but perhaps the most obvious is that, as in *Lorain Journal*, the facts were not analogous to those here. To make them so, the plaintiff in *Aspen* would have had to demand that the defendant supply it with employees so that it could operate its ski facilities around the clock without telling the defendant when their services might be needed. Moreover, MXC, in requesting a coverage agreement, did not break off a longstanding relationship with a competitor as in *Aspen*, since Dr. Read had worked for MXC as an independent contractor. *Cf.* IIIA *Areeda & Hovenkamp* ¶ 772c3 at 193, 194 (noting that *Aspen* did not hold that a firm with monopoly power must enter into cooperative relationships when none existed previously, "and there is no reason for thinking it would have done so"; "[w]e would not interpret [*Aspen*] to give the plaintiff the right to create a new venture where none had existed before").

as opposed to in Sherman Act, Section 1 cases (Pet. 13 & n.5); (2) that there was no free-riding problem in this case to begin with (*id.* 12, 13-14); and (3) that the Eighth Circuit should have provided some type of more in-depth analysis to determine whether the costs of Dr. Read's free-riding "were in line with the costs sought to be imposed on Dr. Read" (*id.* 12).

1. Preliminarily, Dr. Read erroneously assumes throughout his petition that MXC's free-rider concern was its only concern about providing coverage to Read without a coverage agreement, and thus that preventing Read from free-riding was its only legitimate business justification. That assumption is incorrect. As the record showed, MXC's major reason for requesting a coverage agreement was to force Read to establish, disclose, and furnish MXC with a schedule of his availability at SVH so that MXC would know when to have sufficient personnel there to cover his practice. Uncontroverted testimony emphasized that the money Read would pay, if any, under the agreement was a minor concern.

Given Read's history of demanding to work part-time, his unavailability when needed and called, his eschewing night and weekend call, and the complexity of MXC's scheduling personnel to cover many facilities and its need to schedule far in advance, MXC clearly was justified in requesting that Read inform it in advance of when he would and would not cover his own practice at SVH. Depending on the volume of Read's work that MXC would have to cover, MXC could have been forced, ultimately, to hire additional personnel or at least to shift personnel from other facilities to SVH when Read was absent.

2. Any suggestion that the prevention of free-riding is not a legitimate business justification in Section 2 cases, as opposed to Section 1 cases (the only type that Read cites in this section of his petition [Pet. 12-15]), is incorrect. Numerous courts have applied

the doctrine in Section 2 actions. *E.g.*, *Trans Sport Inc. v. Starter Sportswear Inc.*, 964 F.2d 186, 190-91 (2d Cir. 1992); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 930 (4th Cir. 1990); *Olympia Equip. supra*, 797 F.2d at 377-78 (a decision also undermining Read's suggestion that a free-rider justification might not apply where "the challenged restraint was imposed by a monopolist on a . . . competitor" [Pet. 12-13]). Commentators agree. *E.g.*, I ABA Section of Antitrust Law, *Antitrust Law Developments* 276 (4th ed. 1997) ("Refusing to deal . . . may be justified [in Section 2 cases] where it is intended to prevent free riding and to enforce a legitimate limited distribution program.").[9] Indeed, Professor Hovenkamp has explained in some detail that the "most troublesome" aspect of the *Aspen* case was the defendant's failure to put forth the "obvious" justification that when revenue from the joint venture was divided according to actual use of the mountains as the plaintiff demanded, the venture "permitted [plaintiff] to take a free ride on [defendant's] stronger market position." Herbert Hovenkamp, *Federal Antitrust Policy* § 7.5 at 264 (1994).[10]

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9. Similarly, if Read is suggesting that the free-rider justification might not exist outside the context of "a vertical restraint imposed by a manufacturer on a dealer" (Pet. 13), that suggestion is belied by numerous decisions involving free-riding and horizontal relationships or agreements. *E.g.*, *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958, 972 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 190 (7th Cir. 1985).

10. The Ahern article, cited at Pet. 13 n. 5 for the proposition that a free-rider justification should not apply in § 2 cases, is inapposite. There, the author is criticizing the use of the justification where the defendant claims that the free-riding affects a market other than that in which the plaintiff and defendant compete and that the refusal to deal would force the plaintiff to enter a second market in order to compete with the defendant in the first. Patrick J. Ahern, *Refusals to Deal after Aspen*, 63 Antitrust L.J. 153, 177 n. 126, 178 (1994). That factor is absent here. On the other hand, the author notes that "[t]he classic free rider argument has, of course, succeeded in section 2 refusal-to-deal cases." *Id.* at 178.

3. Clearly, Dr. Read's plan was to free-ride off MXC by forcing it to devote its resources to covering his practice so that he would not have to bear the cost of doing so himself. Dr. Read admitted that MXC would incur the cost of providing him with twenty-four-hour coverage rather than his incurring that cost himself (*id.* 1822). MXC's economic expert, based on Read's testimony, had no difficulty in concluding that Read was attempting to free-ride on MXC. *Id.* 2862-63.

Free-riding occurs "when an action taken by an economic unit results in uncompensated benefits to others." Edwin Mansfield, *Microeconomics* 456 (3d ed. 1979). Or, as Professor Hovenkamp explains, "A free rider is a firm who takes free advantage of a service or product that is valued by customers but provided by a different firm." Herbert Hovenkamp, *Federal Antitrust Policy* § 5.2bl at 188 (1994). Both definitions precisely fit the admitted facts here. Read attempted to force MXC to provide him with a valuable service for free so that he could compete with MXC by charging lower prices permitted by his lower costs resulting from MXC's subsidizing his practice. MXC would have had to absorb a cost that Read otherwise would have had to pay. Nothing in the antitrust laws required MXC to "cut its own throat" in this manner, *Illinois v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 883 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), to help Dr. Read by providing him with free inputs for his business.

Amazingly, Dr. Read argues that he never "sought to misappropriate any investment made by MXC," and thus that "there is no free rider problem in the first instance." Pet. 12; see also *id.* 13. But that is exactly what he tried to do by attempting to force MXC to cover his practice for free. MXC "invests" in, as closely as possible, hiring only the number of radiologists necessary to cover its own practice at the different facilities where it provides services. By demanding that MXC supply employees for his

practice as well, Read sought to exploit some of the benefits from those investments, at no cost, for himself. Add to this Read's testimony that he expected to obtain the lion's share of radiology business at SVH (perhaps ninety percent, he said [Tr. 1556]) and his testimony that MXC ultimately might have to hire five additional radiologists to cover his practice (id. 1593), and the free-rider problem becomes particularly obvious and serious.[11]

Just as amazingly, Dr. Read argues that, even if he was misappropriating MXC's investment, there was no free-rider problem because MXC could simply jack-up its prices to its own customers to recoup the cost of his free-riding. Pet. 18. This argument is both incorrect and turns the antitrust laws on their head. In any free-rider context, the firm exploited by free-riding can attempt to increase its price to recoup its additional expense. For example, in the vertical-nonprice-restraints context, *see generally Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the full-service dealer can increase its price to cover the additional services it renders. The problem is that it then will lose sales to the free-rider because the free-rider refuses to bear the full cost of the benefits it receives from the exploited firm's expenditures and thus can charge a lower price:

> The free-rider problem in *Sylvania* arose because dealers who had spent money

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11. Dr. Read claims that MXC's providing coverage for him is no different than "Home Depot accommodat[ing] a neighborhood hardware store by being open on Sunday." Pet. 14. For Read's analogy to hold, the neighborhood hardware store would have to be open on Sunday, need additional employees to do so, and demand that Home Depot supply them without telling Home Depot when it would have to supply them. If Home Depot were required to accede to the store's request, it would have to ensure that it had excess employees ready to serve the neighborhood store. The neighborhood store clearly would be free-riding on Home Depot's investment in its employees.

> promoting Sylvania television sets risked being undercut by other dealers — dealers who had not made such expenditures, and who thus were exploiting the market created by dealers who had. The free riders could undersell the other dealers because their costs of promotion naturally were lower.

General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 593 (7th Cir. 1984).

The important point is that the antitrust laws do not require the exploited firm to shift the burden of a competitor's free-riding to its customers, but rather permit the exploited firm to require the party receiving the benefit to pay for it. In the one decision cited by Dr. Read, *Chicago Professional Sports Ltd. Ptrsp. v. NBA*, 961 F.2d 667 (7th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992), the court rejected the free-riding justification not because the exploited firm, the NBA, was unable to increase its prices to customers of basketball broadcasts, but because "[i]t may (and does) charge members for value delivered," and thus could charge the free-rider, the Chicago Bulls, "for the Bulls' [free] ride." 961 F.2d at 675.[12]

4. Finally, Dr. Read argues that, even if he were free-riding, the Eighth Circuit erred in not analyzing whether the additional costs that MXC would incur in covering his practice "were in line with the costs sought to be imposed on Dr. Read." Pet. 12; see also *id.* 14-16. According to Read, the Eighth Circuit's failure to examine this issue "is at odds with how the free rider issue has been analyzed in other Circuits." *Id.* at 12. This is incorrect.

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12. To the same effect is *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 592 (7th Cir. 1984) (emphasis added), where the court rejected the free-rider justification because the competitors "charged *each other*," not their customers, for the service that allegedly was the subject of free-riding.

Preliminarily, the court of appeals, of course, could not even begin to analyze this question because Dr. Read had refused to discuss a coverage agreement with MXC — at any price or on any terms. Therefore, no one could know what, if any, cost would have been imposed on Read.[13] This lack of knowledge was Read's fault, not MXC's. The evidence did show, however, that a fee was not MXC's primary concern in seeking a coverage agreement, that one dollar a year might have been sufficient, and that Read would have rejected even a one-dollar charge.[14] Read's claim now that "even a demand for one dollar would have been anticompetitive" (Pet. 16) is ridiculous. Even absent a legitimate business justification, conduct cannot be predatory unless it is unreasonably exclusionary, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596-97 (1st Cir. 1993), and Read's own economic expert testified that his paying even $100 for backup "would represent a small cost" (Tr. 716).

Moreover, it is not clear, even from Dr. Read's petition to this Court, what precise analysis he wanted the Eighth Circuit to apply that it did not. At various points, Read suggests that the court of appeals erred by not comparing MXC's costs in providing coverage with the cost it demanded from him; by not applying a Sherman Act, Section 1 full-blown rule-of-reason analysis (Pet. 14 [criticizing the court of appeals for not determining whether the "restraint . . . on Dr. Read was reasonable"]); by not examining whether MXC's legitimate business justification was "pretextual" (Pet. 15); or by not applying a "least-restrictive-alternative" analysis by which MXC's refusal to cover without a contract apparently would be predatory in Read's view if obtaining a coverage agreement " 'went

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13. Thus, Read's assertion that the Eighth Circuit suggested that "MXC could impose *any* cost it wished on Dr. Read" (Pet. 16 [emphasis in original]) mischaracterizes the court's opinion.

14. The lack of evidence in the record about what amount, if any, Read might have paid for coverage also undercuts his policy argument that this case presents an appropriate vehicle for this Court to examine the "raising-rivals'-costs" theory. Pet. 22.

much further than needed for the limited articulated purpose' " for it (*id.* [quoting *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 829 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979)]).

Other than one oblique, unsupported claim that MXC's asserted legitimate business justifications were pretextual in the "Summary of the Argument" portion of his brief below (Appellee's Br. 21), Dr. Read did not even raise these arguments for the Eighth Circuit to consider.[15] But even if he had, the court of appeals would have rightly rejected them.

The court of appeals should not have identified and then balanced the procompetitive and anticompetitive effects of MXC's conduct, even had Dr. Read raised the issue below. Although this type of analysis is frequently necessary in a full-blown Sherman Act, Section 1 rule-of-reason analysis to determine whether an agreement, on balance, unreasonably restrains competition, whether particular conduct undertaken unilaterally is "predatory" for purposes of Section 2 is an entirely different issue. Sections 1 and 2 are different statutes with different standards of analyses. Indeed, this Court has explained that Section 1 is a "sterner" statute because the antitrust laws are inherently more suspicious about conspiratorial activity than unilateral conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984).

Both the decisions interpreting Section 2 and commentary show that courts do not apply a Section 1-type rule-of-reason analysis in determining whether particular conduct is predatory for purposes of Section 2. *E.g.*, *Bell v. Dow Chem. Co.*, 847 F.2d

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15. Of course, "the burden of proving that a proffered business justification is invalid or pretextual is placed on the plaintiff in a § 2 case." III *Areeda & Hovenkamp* ¶ 658f at 127 (citing cases); *see also* IIIA *Areeda & Hovenkamp* ¶ 773e at 216 ("it should be the plaintiff's obligation to persuade the judge or jury that the justification should be rejected") (quoted and relied on by Dr. Read at Pet. 15 n. 7).

1179, 1185-86 (5th Cir. 1988) (explaining that "*Aspen* does not hold that the jury can weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal"). Professors Areeda and Hovenkamp agree and explain why:

> [O]nce a proffered business purpose has been accepted as asserted in good faith and not as a pretense, the defense does not require any kind of "balancing" of social gains against competitive harms, except in the gross sense that trivial justifications should be disregarded.

III *Areeda & Hovenkamp* ¶ 658f at 123. No balancing or full rule-of-reason analysis is appropriate because "the purpose of the business justification inquiry is not to measure the degree of net competitive harm, but rather to aid the decision-maker in characterizing the nature of the defendant's conduct [as predatory or not]." *Id.*[16]

Similarly, although some courts have folded a "least-restrictive-alternative" requirement into full-blown Section 1 rule-of-reason analysis, others reject it, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986) (noting that this Court did not intend lower courts to "calibrate degrees of reasonable necessity"), *cert. denied*, 479 U.S. 1033 (1987). Again, respected commentators agree: "A general antitrust tribunal is not in a good position to determine whether a less restrictive alternative is in fact viable under the circumstances." III *Areeda & Hovenkamp* ¶ 658f2 at 129.

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16. Indeed, the authors note that "in *Aspen*, the Court did not call for any balancing of the social gains from refusing to deal or cooperate with rivals based on legitimate business purposes against the losses resulting from that refusal." IIIA *Areeda & Hovenkamp* ¶ 772c2 at 192.

Finally, even were there a least-restrictive-alternative requirement, Dr. Read suggested no reasonable alternative that would have solved the free-rider problem, or, even if free-riding were not a legitimate business justification, MXC's concern about not knowing when Dr. Read would be present at SVH and thus when it would have to cover his practice. The burden of raising and proving a less restrictive alternative was Dr. Read's. *Cf. United States v. Brown Univ.*, 5 F.3d 658, 668-669 (3d Cir. 1993) (noting that plaintiff bears the burden, in § 1 cases, of proving that defendant could have achieved comparable benefits through a less restrictive alternative).

In sum, there is no conflict between the Eighth Circuit's opinion and any opinion of this Court or any court of appeals considering whether or under what circumstances a legitimate business justification exists. Rather, after reviewing the evidence itself, it was clear to the Eighth Circuit, as it had been to the district court, that MXC had legitimate reasons to be concerned about providing Dr. Read with coverage without an agreement.

II.

THIS CASE PRESENTS NO LEGAL OR POLICY QUESTION ON WHICH THIS COURT'S GUIDANCE IS NEEDED.

A. The Decision Will Not "Pave[ ] The Way For Exclusionary Conduct".

1. To argue as Dr. Read does that the Eighth Circuit's decision "paves the way for exclusionary conduct" and to suggest that health-care providers with market power, based on the Eighth Circuit's opinion, will flock to raise their rivals' costs and then cry free-riding and cite the court of appeals' opinion (Pet. 22) is simply hyperbole that unfairly denigrates the abilities of federal-court

judges to apply well-worn and acknowledged antitrust principles. If a plaintiff, as here, refuses to cooperate with a rival to obtain the benefit it seeks or attempts to free-ride, or if other legitimate business justifications exist for the challenged conduct indicating that it was not predatory, then a court should so hold. On the other hand, if the plaintiff proves the essential elements of a Section 2 violation and that, under Section 4 of the Clayton Act, the defendant's unlawful conduct caused the plaintiff's damages, then the court should and will so hold.

2. Neither the antitrust laws nor the Eighth Circuit is "hostile to would-be 'price-chopping' competitors in monopolized markets." Pet. 23. But Dr. Read, unlike the Eighth Circuit, failed to recognize a simple antitrust principle — that the goal of antitrust law, and thus of courts interpreting Section 2, is "to permit firms to enter and operate in markets *to the extent they are capable of supplying their own inputs*, and without interference from dominant firms." IIIA *Areeda & Hovenkamp* ¶ 771b at 176 (emphasis in original). In sum, "[b]rand new firms are expected to make their own way in the market," *Olympia Equip. supra*, 797 F.2d at 370; bear their own costs; and not hinder their competitors by attempting to force them to share their resources without consideration of the effect on their competitor's operations.

B. This Court Does Not Need To Reaffirm That The Antitrust Laws Apply To The Health-Care Sector.

1. This case has no "special significance" (Pet. 23) simply because it involves participants in the health-care sector. At this juncture in the history of antitrust jurisprudence, it hardly is necessary for this Court "to reaffirm that the antitrust laws apply to the health care industry." *Id.* 24. This Court applied the antitrust laws to physicians as early as 1943 in *American Medical Ass'n v. United States*, 317 U.S. 519 (1943); and since 1976, it has decided eleven antitrust cases involving the health-care sector, from *Hospital*

Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), to *Summit Health Ltd. v. Pinhas*, 500 U.S. 322 (1991). Additionally, numerous cases from every court of appeals have applied the antitrust laws to almost every type of participant and issue in the health-care sector. *Cf. Boulware v. Nevada*, 960 F.2d 793, 797 (9th Cir. 1992) ("The antitrust laws apply to hospitals in the same manner that they apply to all other sectors of the economy. Health care providers are exposed to the same liability and entitled to the same defenses as businesses in other industries.").

2. Finally, to suggest as Dr. Read does that the Eighth Circuit's "summary disposition of this case reflects a judicial approach which resists application of the antitrust laws to health care markets" is erroneous and unfair. The Eighth Circuit has a rich history of examining antitrust issues in the health-care sector. *E.g.*, *FTC v. Freeman Hosp.*, 69 F.3d 260 (8th Cir. 1995). Moreover, the antitrust principles and analysis that it applied in this case are the same that it has applied in antitrust cases involving other industries. *E.g.*, *National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisers Found.*, 64 F.3d 1130, 1136 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996) (holding that plaintiffs failed to prove causation; rather, they "blamed everyone but themselves . . . , but their problems can be traced directly back to [their] corporate office"). In sum, there is no indication that the Eighth Circuit is reluctant to apply, or that it misapplied here, antitrust principles in cases focusing on health-care markets.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

JOHN J. MILES
Counsel of Record
OBER, KALER, GRIMES
& SHRIVER, P.C.
1401 H Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 326-5008

WILLIAM P. FULLER
FREDERICK M. ENTWISTLE
JAMES E. MOORE
WOODS, FULLER, SHULTZ
& SMITH P.C.
300 South Phillips Avenue
Suite 300
Sioux Falls, South Dakota 57104
(605) 336-3890

Attorneys for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RALPH L. READ, M.D.,

Petitioner,

v.

MEDICAL X-RAY CENTER, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD R. WINTER
(Counsel of Record)
HENRY S. ALLEN, JR.
GEORGE M. SANDERS
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, IL 60661
(312) 715-5700

STEVEN W. SANFORD
CADWELL SANFORD
DEIBERT & GARRY, LLP
120 North Phillips Avenue
Sioux Falls, SD 57102
(605) 336-0828
Counsel for Petitioner

Of Counsel:
STEPHEN F. ROSS
University of Illinois
College of Law
Champaign, IL 61821
(217) 333-2502

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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INTRODUCTION

MXC's brief does not dispute MXC's possession of monopoly power. MXC also writes that, "the parties agree that MXC offered to [serve Dr. Read's customers] ***if*** he would enter into a coverage agreement with MXC." MXC's Response, p. 10. The only issue thus presented is whether MXC's demand for a payment from Dr. Read as a condition for not discriminating against his customers was anti-competitive—i.e., whether it impaired the opportunities of rivals and is neither "competition on the merits" nor more restrictive than reasonably necessary for such competition. IIIA Phillip Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶650(a) at 66 (1996) ("Areeda & Hovenkamp").

MXC's brief hones to a sharp edge the parties' differences on this point. MXC first asserts that *Lorain Journal* and *Aspen* are distinguishable, and hence that the Eighth Circuit's failure to even mention those decisions is excusable. But as demonstrated below, each of those decisions proscribe conduct strikingly similar to that of MXC here. Next, MXC disputes the need for the type of Section 2 analysis sought by Dr. Read and applied by Circuits other than the Eighth. MXC writes:

> "The court of appeals *should not* have identified and then balanced the procompetitive and anticompetitive effects of MXC's conduct. . . Although this type of analysis is frequently necessary in a full-blown Sherman Act, Section 1 rule-of-reason analysis to determine whether an agreement on balance unreasonably restrains competition, whether particular conduct undertaken unilaterally is "predatory" for purposes of Section 2 is an entirely different issue." MXC's Response, p. 23 (emphasis added).

This Court's resolution of each of these issues is particularly appropriate given the scholarly recognition of the need for guidance from this Court in defining anticompetitive behavior. *See*, Handler, Blake, Pitofsky and Goldschmid, Trade Reg., 3d Ed. UCB-1 at 805 (1993).

I. MXC'S SUGGESTION THAT THE COURT NEED NOT BALANCE HARM AND BENEFITS

A. *Aspen* And *Lorain Journal*

MXC's view that *Lorain Journal* is not applicable here is tainted by its view that Dr. Read was asking that MXC "cover his practice." But that approach misses a critical element of the situation at Sioux Valley Hospital: that it was *consumers* (i.e., referring physicians) who wanted to select Dr. Read as their first choice and MXC when Dr. Read was not available. Stated another way, MXC's refusal to deal was directed primarily to referring physicians and patients who had selected Dr. Read as a first choice of radiologist.[1]

Viewed from the perspective of what consumers wanted, MXC's free-rider analysis breaks down. Consider the Home Depot example used by both parties. From the standpoint of the Main Street hardware store's customers, Home Depot's refusal to service the hardware store's customers is discrimination. Those customers (like the referring physicians in this case) do not ask that Home Depot (or MXC here) add any additional employees to service the custom-

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[1] As this Court noted in *Aspen*, it is proper to consider the effects of the alleged restraint from the standpoint of consumers, among others. See, 472 U.S. at 605 ("In addition, it is relevant to consider [the conduct's] impact on consumers. . .")

ers' needs when the hardware store is closed. They simply ask that Home Depot provide the same level of service to them as it would any other customer, and not evaluate whether the customers prefer the hardware store before deciding whether to fill their needs.

MXC asserts that *Aspen* is not applicable because, according to MXC, "unlike the defendants in *Lorain Journal* and *Aspen,* who refused to deal with their competitors, MXC did not refuse to deal with Dr. Read." MXC's Response, p. 11. But in *Aspen*, for example, this Court made clear that the defendant's offer to deal with plaintiff *if* plaintiff accepted a sharply lower share of joint venture profits did not excuse defendant's conduct. *See*, 472 U.S. at 592 ("The board decided to offer Highlands a 4-area ticket *provided* that Highlands would agree to receive a 12.5% fixed percentage of the revenue—considerably below Highlands' historical average based on usage.") (emphasis added) Here too, MXC offered a coercive deal, and the jury found that Dr. Read's rejection of that offer was justified.

B. MXC's Suggestion That A Jury Need Not Balance Competitive Harm And Benefits

MXC next suggests that in a Section 2 (monopolization) case, it is not necessary for the jury or court to balance anticompetitive effects and benefits. In other words, MXC suggests that a monopolist merely needs to "cry free-rider in a crowded courtroom" and the plaintiff loses. In support of this theory, MXC writes, "both the decisions interpreting Section 2 and commentary show that courts do not apply a Section 1-type rule-of-reason analysis in determining whether particular conduct is predatory for purposes of Section 2." MXC's Response, p. 21. But MXC acknowledges a split of authority on this point when it writes, "although some courts have folded a 'least restrictive alternative'

requirement into full-blown Section 1 rule-of-reason analysis, *others reject it." Id.*, p. 22. (emphasis added)[2]

In his opening brief, Dr. Read identified those Circuits that had rejected MXC's proposed analytical structure and had applied a full balancing of competitive benefits and detriments. See, Petition, pp. 14-16. The resolution of this issue alone is enough to warrant this Court's review of this case.

C. MXC Has Offered No Justification For The Penalty Payment

MXC next attempts to justify its demand for the penalty payment. But even after the passage of seven years since the payment was demanded, MXC still cannot articulate a reason why it needed a payment from Dr. Read. MXC repeatedly states: "testimony showed that MXC's primary concern in seeking a written agreement was to lock Read into and obtain a schedule of his presence at SVH so that it could schedule its radiologists accordingly." MXC's Response, p. 7. But the issue of when Dr. Read would be there, and when he would not, is not solvable by requiring Dr. Read to make a "penalty payment" to MXC.

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[2] This Court, for one, has written:

> The question whether Ski Co.'s conduct may properly be characterized as exclusionary conduct cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an ***unnecessarily restrictive*** way. *Aspen*, 472 U.S. at 605 (emphasis added).

And in *Lorain Journal*, the trial court had considered and rejected the newspaper's supposed business justifications as pretextual. See, *United States v. Lorain Journal*, 92 F.Supp. 794, 797 (N.D. Ohio 1950).

MXC is thus left to argue that it only sought a $1.00 payment from Dr. Read. But this was a fabrication created for trial. The proposed contract contained a "blank" in the payment section, and the language of the contract with respect to the manner of payment—e.g., that the money needed to be paid "in advance"—evidenced that MXC was demanding a significant payment. So did the fact that MXC's attorney told Dr. Read, "you're going to have to pay." Tr. 1647.

II. MXC'S SUGGESTION THAT THE EIGHTH CIRCUIT "DISCUSSES EACH ALLEGED PREDATORY ACT"

In a footnote addressing Dr. Read's contention that the Eighth Circuit did not properly apply the analysis mandated by *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), MXC states that "[the Eighth Circuit's] opinion discusses each alleged predatory act." MXC's Response, p. 10, n. 6. But nowhere does the Eighth Circuit (or MXC in its Response for that matter) mention the market division scheme the district court characterized as the most obvious of MXC's anticompetitive acts, or the fact that the district court enjoined the enforcement of the CPC/MXC contract. Without an acknowledgment of this conduct, no conclusion that MXC's conduct was legitimate is sustainable.

III. THE CUSTOMARY PRACTICE OF MXC—A FIRM *WITH MONOPOLY POWER*—WAS THE IMPROPER BASIS OF THE EIGHTH CIRCUIT'S CONCLUSION THAT THE CONDUCT WAS NOT ANTICOMPETITIVE

MXC contends that the Eighth Circuit did not base its characterization of MXC's conduct on its understanding of the "the medical community's normal coverage practices".

It contends instead that this was "one fact that, at most, [the Eighth Circuit] felt was relevant". MXC's Response, p. 10. fn. 6. But the Eighth Circuit's opinion wraps up all of the discussion of MXC's conduct into one sentence that ultimately applies an improper community standard litmus test for the conduct: "*Simply put,* Read was trying to force MXC to cover his business without following the medical community's normal coverage practices—paying MXC compensation for the service or agreeing to back up MXC doctors in exchange". App., 6a.

If as MXC argues at Response at 10, one good way of determining whether certain challenged conduct is exclusionary is to see whether "those without power engage in the same conduct", then this certainly does not justify what the Eighth Circuit has done here. MXC *has* monopoly power. The Eighth Circuit references only the practice of "paying MXC compensation", and significantly references no evidence regarding the business practices of firms in competitive markets. Dr. Read's evidence from competitive markets was that there is no practice of demanding payment from a competitor. See Petition at 17-18.

The decision here is therefore not consistent with the Tenth Circuit's opinion in *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir. 1975), cited by MXC at page 10 of its response. The *Telex* court judged the complained-of acts by whether they were, "typical of those used in a competitive market." *Id.* at 926. In analyzing conduct, it is important to distinguish, as did the Tenth Circuit, between conduct typical in a competitive market and conduct in a monopolized market. It merits this Court's consideration of Dr. Read's question of whether conduct should be excused because it is a "customary practice" in a monopolized market.

IV. MXC'S SUGGESTION THAT THE POINTS RAISED BY DR. READ HAVE BEEN WAIVED

On at least two occasions, MXC suggests that Dr. Read failed to preserve in the courts below the issues raised in this Court. But at every stage of this litigation—in summary judgment motions, in tendered jury instructions, in post-trial motions, and in the Eighth Circuit—Dr. Read raised the precise issue now before the Court. For example:

a. In his Petition for Rehearing, Dr. Read wrote, "the panel's theory . . . undermines the principles articulated in *Kansas City Star Company v. United States*, 240 F.2d 643 (8th Cir. 1957) and the case it relies upon, *Lorain Journal* . . ." and that "[the panel's decision] is at odds with *Aspen*." See, Petition For Rehearing, p. 14;

b. Dr. Read's opening brief in the court of appeals contained the following sections in the Argument portion of the brief: 1) *Lorain Journal* and *Kansas City Star* Prohibit the Type of Discrimination MXC Practiced Here (Appellee's Brief, p. 27); 2) MXC's Refusal to Cooperate With Dr. Read Violates The Principles Of *Aspen* (Appellee's Brief, p. 28); and 3) MXC's Supposed Business Justifications For Its Conduct Are Illusory (Appellee's Brief, p. 33).

These references demonstrate that Dr. Read has consistently maintained that *Lorain Journal* and *Aspen* control this case, and that the Eighth Circuit had an obligation to scrutinize MXC's proffered business justification.

V. MXC'S VERSION OF THE FACTS

MXC devotes most of the first six pages of its Response repeating the factual argument that the jury (and the district court) rejected. These factual argument are mere distractions, not affecting the questions posed to this Court

by Dr. Read. But a review of the record would reveal that MXC (like the Eighth Circuit) has lost sight of the fact that Dr. Read prevailed before the jury; and hence, that Dr. Read's version of the facts controls. A few illustrations will make the point:

a. MXC asserts that Dr. Read was "uncooperative". But prior to this litigation, Dr. Read was praised by his colleagues as "honest, hard working and dependable", "extremely bright, competent and dedicated" with unreproachable "moral, ethical and professional standards." Exh. 246; Tr. 2447;

b. MXC asserts that "Read made little or no effort, however, to compete for business at what he now refers to as "the only point[s] of market entry." MXC's Response, p. 3. But it is undisputed that Dr. Read attempted to exercise his privileges at every area hospital, and in each instance, MXC intervened to inhibit that effort;

c. MXC contends that it obtained the CPC contract because "in effect, it offered CPC a lower price than in the past." MXC's Response, p. 3. But this rationale was not accepted by either the jury or the district court (which enjoined enforcement of the contract);

d. MXC says that "Read claims that MXC entered into an exclusive contract with McKennan." MXC's Response, p. 3. But Dr. Read never made that claim. He did claim, and proved, that after a secret meeting between MXC and McKennan, Dr. Read was excluded from practicing at McKennan based on the *pretense* that there was an exclusive contract between McKennan and MXC. Tr. 313, 322, 328, 1501, 1504;

e. MXC says that "when Dr. Read did finally post a schedule of availability, it stated that he would be at SVH only three hours a day during the week." MXC's Response, p. 5. But that schedule was a guaranteed minimum, not a maximum. And Dr. Read posted it in

> an attempt to get MXC to discuss with him a workable working plan for the department of radiology; instead, MXC continued its strategy of refusing to cooperate with Dr. Read in any way. Ironically, MXC now complains that it needed a coverage contract to obtain from Dr. Read the very commitment they would not talk to him about in the summer of 1990.

The jury rejected MXC's version of the facts. Based on the proper standard of review, the Eighth Circuit should have done the same.

CONCLUSION

For the reasons stated above, and those set forth in Dr. Read's Petition For Certiorari, Dr. Read requests that this Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

RICHARD R. WINTER
(Counsel of Record)
HENRY S. ALLEN, JR.
GEORGE M. SANDERS
McBRIDE BAKER & COLES
500 West Madison Street
Chicago, IL 60661
(312) 715-5700

STEVEN W. SANFORD
CADWELL SANFORD
DEIBERT & GARRY, LLP
120 North Phillips Avenue
Sioux Falls, SD 57102
(605) 336-0828
Counsel for Petitioner

Of Counsel:
STEPHEN F. ROSS
University of Illinois
College of Law
Champaign, IL 61821
(217) 333-2502